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COMMENT

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UNCONSCIONABILITY AS A COHERENT LEGAL CONCEPT

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## INTRODUCTION

The idea that contracts give legal force to a “meeting of the minds,” or a bargained-for exchange between two parties, is an old concept in contract law.<sup>1</sup> Enforcement of a contract that satisfies this “meeting of the minds” furthers welfare maximization and individual autonomy by reinforcing a promise that both parties believed would make them better off. But in many modern contracts—especially those between businesses and consumers—a meeting of the minds never occurs. Rather, consumers almost never bargain for the terms. And often, they do not even know what the terms are. With respect to these “contracts of adhesion,”<sup>2</sup> it is not clear that the standard justification for contract enforcement exists.

Indeed, the common law does not require a meeting of the minds for a contract to exist. Long ago, the common law abandoned that element in favor of a requirement of objective manifestation of assent<sup>3</sup>—today, a signature on the line or click of the box constitutes valid acceptance, regardless of the consumer’s ignorance of, or opposition to, the terms of the contract. Moreover, once a consumer has assented to the contract, evidence about what she thought the contract contained is barred under the parol evidence rule, which requires courts to interpret contracts according to their clearly written terms, excluding evidence of negotiations or expectations of the parties.<sup>4</sup> As a result, with the law’s endorsement, contracts of adhesion have proliferated.

Today, contracts of adhesion govern almost every major financial undertaking, like securing a loan, using purchased software, obtaining insurance, renting a car, having a cell phone, going on a cruise, banking online, and accepting employment.<sup>5</sup> Typically, such contracts require arbitration of disputes, mandate confidentiality with respect to the results of

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1 See E. Allan Farnsworth, “*Meaning*” in the Law of Contracts, 76 YALE L.J. 939, 943-44 (1967) (describing the origins of the “meeting of the minds” doctrine); see also Richard L. Barnes, *Rediscovering Subjectivity in Contracts: Adhesion and Unconscionability*, 66 LA. L. REV. 123, 139 (2005) (explaining that by the mid-nineteenth century, contract law abandoned a subjective theory of acceptance in favor of one based on objective manifestation of assent).

2 See Arthur Allen Leff, *Contract as Thing*, 19 AM. U. L. REV. 131, 143 (1970) (explaining that such contracts do not involve the haggling or cooperative drafting of typical contracts, their creation being “rather of a fly and flypaper” (footnote omitted)).

3 See 1 E. ALLAN FARNSWORTH, FARNSWORTH ON CONTRACTS § 3.6 (3d ed. 2004) (“By the end of the nineteenth century, the objective theory had become ascendant and courts universally accept it today.”).

4 2 FARNSWORTH, *supra* note 3, § 7.3, at 226.

5 See, e.g., Jessica Silver-Greenberg & Robert Gebeloff, *Arbitration Everywhere, Stacking the Deck of Justice*, N.Y. TIMES (Oct. 31, 2015), <http://www.nytimes.com/2015/11/01/business/dealbook/arbitration-everywhere-stacking-the-deck-of-justice.html> [<http://perma.cc/JQ9M-VUXY>] (discussing the prevalence of arbitration provisions in consumer and employment contracts).

the arbitration, waive the consumer's right to participate in a class action lawsuit, provide a shorter limitations period in which to file suit, choose a forum for any ensuing litigation, and assign all court costs to the consumer.<sup>6</sup> The contracts may also limit the company's liability and give unilateral modification rights to the business.<sup>7</sup> Reading and understanding these contracts would require significant time and legal training. Consumers thus often choose not to read them, leaving themselves at the mercy of businesses with respect to the legal rights that govern their daily economic transactions.

Some courts searched for a way to rein in contracts of adhesion, perceiving them to be an abuse of contract law, ultimately landing on the doctrine of unconscionability.<sup>8</sup> Unconscionability was an arcane, nebulous concept in contract law that courts had used to avoid enforcing contracts that "shock the conscience."<sup>9</sup> The doctrine seeks "the prevention of oppression and unfair surprise" and directs against the "disturbance of allocation of risks because of superior bargaining power."<sup>10</sup> The distinctive element of the unconscionability defense, as opposed to fraud or duress, is its two-pronged analysis: traditionally, a provision must be both procedurally and substantively unconscionable to be held unenforceable.<sup>11</sup> Procedural unconscionability "arises out of defects in the process by which the contract was formed, and can include a variety of inadequacies, such as age, literacy, lack of sophistication, hidden or unduly complex contract terms, bargaining tactics, and the particular setting existing during the contract formation process."<sup>12</sup> Substantive unconscionability "suggests the exchange of obligations so one-sided as to shock the court's conscience."<sup>13</sup> If a court finds that a provision is substantively unconscionable,

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<sup>6</sup> See FAIR CONTRACTS, <http://www.faircontracts.org> [<http://perma.cc/6BRC-SET3>] (last visited Nov. 21, 2015) (listing and explaining, for the purpose of consumer education, the types of provisions frequently found in contracts of adhesion).

<sup>7</sup> *Liquidated Damages Clause*, FAIR CONTRACTS, <http://www.faircontracts.org/contract-provisions/liquidated-damages-clause> [<http://perma.cc/68VH-L3VZ>] (last visited Nov. 21, 2015); *Universal Modification*, FAIR CONTRACTS, <http://www.faircontracts.org/contract-provisions/unilateral-modification> [<http://perma.cc/M88H-EMFF>] (last visited Nov. 21, 2015).

<sup>8</sup> See *infra* Section I.A.

<sup>9</sup> See *Rodriguez v. Raymours Furniture Co.*, 93 A.3d 760, 767 (N.J. Super. Ct. App. Div. 2014).

<sup>10</sup> U.C.C. § 2-302 cmt. 1 (AM. LAW INST. & NAT'L CONFERENCE OF COMM'RS ON UNIF. STATE LAWS 2014); see also Melissa T. Lonegrass, *Finding Room for Fairness in Formalism—The Sliding Scale Approach to Unconscionability*, 44 LOY. U. CHI. L.J. 1, 8 (2012) (explaining that the drafters of the Uniform Commercial Code intentionally left it to courts to define unconscionability).

<sup>11</sup> Lonegrass, *supra* note 10, at 11; see also Arthur Allen Leff, *Unconscionability and the Code—The Emperor's New Clause*, 115 U. PA. L. REV. 485, 487 (1967) (coining the terms "procedural unconscionability" and "substantive unconscionability").

<sup>12</sup> *Rodriguez*, 93 A.3d at 767 (citation omitted).

<sup>13</sup> *Id.* (citation omitted). For one of the earliest American cases citing the "shocks the conscience" standard, see *In re Downham Co.*, 165 A. 152, 153 (Del. Super. Ct. 1932) ("Inadequacy of

it can void the specific provision and leave the rest of the contract intact.<sup>14</sup> Using unconscionability, it is possible for courts to step in and prevent the enforcement of a variety of contract provisions.

Most courts do not find contracts of adhesion to be unconscionable per se, though they typically consider the lack of bargaining power and inability to choose, negotiate, or understand terms as indications of procedural unconscionability.<sup>15</sup> A minority of courts find that adhesiveness alone—a low likelihood that a consumer read, understood, or negotiated the contract—can establish procedural unconscionability.<sup>16</sup> In general, however, contracts of adhesion are enforceable unless the substantive terms are also unconscionable.<sup>17</sup>

Courts and scholars alike fear the ambiguity of the doctrine, worrying that it lacks predictability and consistency, and that liberal use could swallow all of contract law.<sup>18</sup> They recognize the need for a structure—for unconscionability to act as a true legal concept with clearly defined edges that prevent it from bleeding into every case. This raises the question: what would unconscionability need in order to be a legal concept? And does it already qualify?

A legal concept is “an abstract set of legal categories that . . . subordinate[s] particular legal relationships to a general system of classification.”<sup>19</sup> Without a concept, it would be difficult if not impossible for

price when not sufficiently great to shock the sense of the Court, yet coupled with circumstances tending to show a sacrifice of the property at the sale, is always considered.”)

<sup>14</sup> U.C.C. § 2-302(1).

<sup>15</sup> See Lonegrass, *supra* note 10, at 9-10 (providing factors considered to determine whether a contract is procedurally unconscionable).

<sup>16</sup> See, e.g., *Gentry v. Superior Court*, 165 P.3d 556, 572 (Cal. 2007) (“The procedural element of an unconscionable contract generally takes the form of a contract of adhesion, which, imposed and drafted by the party of superior bargaining strength, relegates to the subscribing party only the opportunity to adhere to the contract or reject it.” (citation omitted)); *Kelker v. Geneva-Roth Ventures*, 2013 MT 62, ¶ 29, 369 Mont. 254, 303 P.3d 777 (“A contract is unconscionable if it is a contract of adhesion and the contractual terms unreasonably favor the drafter.” (citation omitted)); *State ex rel. King v. B & B Inv. Grp., Inc.*, 2014-NMSC-024, ¶ 27, 329 P.3d 658 (N.M. 2014) (“[A]n adhesion contract is procedurally unconscionable and unenforceable when the terms are patently unfair to the weaker party.” (citation omitted)).

<sup>17</sup> 1 FARNSWORTH, *supra* note 3, § 4.28, at 585 (“Courts have resisted applying the doctrine where there is only procedural unconscionability without substantive unfairness.” (footnote omitted)). *But see* Lonegrass, *supra* note 10, at 16-17 (describing courts’ relaxation of the requirements for the substantive prong when the procedural prong is met).

<sup>18</sup> See, e.g., Larry A. DiMatteo & Bruce Louis Rich, *A Consent Theory of Unconscionability: An Empirical Study of Law in Action*, 33 FLA. ST. U. L. REV. 1067, 1085 (2006) (“One of the major criticisms leveled at the doctrine of unconscionability, as expressed in section 2-302, is that it fails to prescribe meaningful content, namely a workable definition of unconscionability.”); Leff, *supra* note 11, at 491 (noting that “[o]ne of the central problems” with unconscionability is that it fails to answer the question, “what, if anything, will insulate a contract from [it]?”). By “doctrine” here I mean courts’ use of the concept.

<sup>19</sup> MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW 1870-1960*, at 14 (1992).

a judge to rule consistently on a case involving the same legal issue as a prior case but a different factual situation.<sup>20</sup> For example, if there is precedent that a contract is unconscionable because it required a consumer to file her claim in California despite only having contacts in New York, how is a judge in a subsequent case to know whether a contract requiring a consumer to file within sixty days is similarly unconscionable? Does the concept of unconscionability encompass the former, but not the latter? In order to know, one must clearly define what the concept means. In this way, concepts connect particular factual scenarios together—they order our thinking, abstracted from particular instances. This ability to categorize is the first element of a legal concept.

The second element of a legal concept is that it serves as a rational basis for normative decisions. A legal concept, unlike, say, a literary concept, must do more than simply classify. It becomes “a normative force that provides a reason for action or decision.”<sup>21</sup> Because judges use classifications as the bases for judgments, the classification must rationally connect to a rule. Classification and normativity are the hallmarks of a legal concept.<sup>22</sup>

These two elements also suggest two meanings at work behind legal concepts: jural meaning and normative meaning. As Shyamkrishna Balganesh and Gideon Parchomovsky explain, the jural meaning is the “structural core” of the concept, or its rule-like character.<sup>23</sup> However, this meaning is often open-textured, or indeterminate. To apply a concept, judges employ the normative meaning that accompanies it.<sup>24</sup> A useful example in tort law is the duty of care. The jural meaning of the duty of care is that an individual has an obligation to avoid causing significant harm. The normative meaning is debated, but one commonly put forth is that the cheapest cost avoider should bear the duty.<sup>25</sup> Another normative meaning is that the duty of care is based on “basic moral principles.”<sup>26</sup> Balganesh and Parchomovsky argue that the

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<sup>20</sup> See Leff, *supra* note 2, at 135 (“[C]lassification is a powerful intellectual device for efficiently identifying nonidentical things and concepts which may for certain purposes be treated identically.”).

<sup>21</sup> Frederick Schauer, *Formalism*, 97 YALE L.J. 509, 535 (1988).

<sup>22</sup> See Thomas C. Grey, *Langdell's Orthodoxy*, 45 U. PITT. L. REV. 1, 11 (1984) (“When a new case arose to which no existing rule applied, it could be categorized and the correct rule for it could be inferred by use of the general concepts and principles; the rule could then be applied to the facts to dictate the unique correct decision in the case.”).

<sup>23</sup> See Shyamkrishna Balganesh & Gideon Parchomovsky, *Structure and Value in the Common Law*, 163 U. PA. L. REV. 1241, 1244 (2015) (discussing how jural meaning forms the core of common law concepts).

<sup>24</sup> See *id.* (explaining how the “normative meaning does not displace the jural meaning,” but rather “works in tandem with” the jural meaning).

<sup>25</sup> *Id.* at 1245.

<sup>26</sup> *Id.*

dual meanings of concepts in the common law—both jural and normative—give the common law useful flexibility, allowing it to adapt to new situations.<sup>27</sup>

Unconscionability is an interesting creature in the common law—for some time, it was a quasi-concept. It had a normative meaning but lacked a jural meaning. This made the doctrine unclear, unstable, and unpredictable; to be a legal concept, unconscionability must coalesce around a jural meaning as well. It must categorize instances predictably, so that like cases can be treated alike, be definable in a way that accounts for other concepts in the law, and be situated in the common law context of contract law with definable limits, such that it works within, not against, current legal concepts.

By looking at courts' recent uses of unconscionability to hold contracts of adhesion unenforceable, this Comment argues that a structural, rule-like meaning has emerged in the concept that should allay concerns about its vagueness. This meaning fills in the previously ambiguous conceptions of unconscionability with the following definition: *when the offeror has reason to believe that a reasonable person in the shoes of the offeree would not know the meaning of the contract, the offeror cannot impose on the offeree terms either that a reasonable person would not expect, or that, even if expected, would impose costs on third parties similarly situated to the offeree.* In addition to providing predictability, this definition fits within the common law system already in place.

Describing and advocating for unconscionability's coherence as a concept with a jural meaning implicates the debate over the usefulness of legal concepts. At the heart of this debate is the American Law Institute's (ALI) project of restating the law by identifying concepts' structural meaning. Realists once ridiculed this project as "the last . . . gasp of a dying tradition."<sup>28</sup> Yet it continues to serve a central role in the law. Today, the ALI is embarking on a third Restatement of Contracts, specifically focusing on the issue of contracts of adhesion.<sup>29</sup> A conceptual understanding of unconscionability would be useful to parties to the ALI's project.

At the same time, offering a conceptual understanding implicates support for the ALI's project of legal conceptual analysis. It also implicates support

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<sup>27</sup> See *id.* at 1273 ("The combination of the stable jural meaning and the flexible normative meaning with which common law concepts can be imbued creates an important equilibrium. This equilibrium allows the common law to guide behavior, promote reliance, and ground decisionmaking, while at the same time remaining open and receptive to competing normative theories and values.").

<sup>28</sup> See Jeremy Waldron, "Transcendental Nonsense" and System in the Law, 100 COLUM. L. REV. 16, 52 (2000) (quoting Legal Realist Felix Cohen).

<sup>29</sup> See OREN BAR-GILL & OMRI BEN-SHAHAR, OUTLINE: RESTATEMENT OF THE LAW THIRD, CONSUMER CONTRACTS 1-4 (2012), <http://www.ballardspahr.com/-/media/files/alerts/2012-12-06-outline.pdf> [<http://perma.cc/XF5S-8PPA>] (describing how the area of consumer contracts has become distinct from commercial contracts).

for courts' continued use of unconscionability to reign in contracts of adhesion. These normative implications underlie the primarily descriptive approach of this Comment.

Despite the need for a new conceptual synthesis of the doctrine in light of recent changes, there has been little scholarship on the topic.<sup>30</sup> While many have focused on whether and to what extent courts should enforce contracts of adhesion, few have examined the doctrinal changes that have allowed courts to intervene. Besides criticizing unconscionability's vagueness, most scholarship ignores the doctrine, thereby failing to connect with the tools courts have to respond to such contracts.<sup>31</sup>

Part I describes the history of legal responses to contracts of adhesion and the early use of unconscionability. Part II explores the normative meaning of unconscionability by considering responses to contracts of adhesion in law and economics scholarship, and identifies two well-supported concerns about such contracts from an economic perspective. Finally, Part III looks to recent state courts' uses of unconscionability as a response to contracts of adhesion in an effort to identify a structural meaning that corresponds with the concept's normative meaning. This Part both argues that unconscionability is becoming a coherent concept and analyzes the way the concept complements other concepts in the common law.

## I. THE UNCONSCIONABILITY DOCTRINE: RECENT USAGE AND HISTORY

### A. *The Recent Rise in the Use of Unconscionability*

For the majority of the twentieth century, courts used the doctrine of unconscionability sparingly.<sup>32</sup> Though some cite *Williams v. Walker-Thomas Furniture Co.*<sup>33</sup> and the surrounding period as a heyday for the

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<sup>30</sup> See Lonegrass, *supra* note 10, at 7 (“[B]eyond bare recognition, these alternatives to the traditional unconscionability approach remain grossly under-analyzed.”).

<sup>31</sup> See, e.g., David Gilo & Ariel Porat, *Viewing Unconscionability Through a Market Lens*, 52 WM. & MARY L. REV. 133, 177-86 (2010) (presenting guidelines for when courts should intervene in contracts of adhesion, with minimal discussion of current doctrine).

<sup>32</sup> See Susan Landrum, *Much Ado About Nothing?: What the Numbers Tell Us About How State Courts Apply the Unconscionability Doctrine to Arbitration Agreements*, 97 MARQ. L. REV. 751, 762 (2014) (explaining that courts were much less likely to use unconscionability before the twentieth century than during and after it); see also Jeffrey W. Stempel, *Arbitration, Unconscionability, and Equilibrium: The Return of Unconscionability Analysis as a Counterweight to Arbitration Formalism*, 19 OHIO ST. J. ON DISP. RESOL. 757, 813 (2004) (citing the law and economics movement as a reason for enforcing arbitration clauses in form contracts).

<sup>33</sup> 350 F.3d 445 (D.C. Cir. 1965).

unconscionability doctrine,<sup>34</sup> parties' success in using it was not statistically greater during the late 1960s and 1970s than it was in the 1990s.<sup>35</sup> Moreover, even in the 1980s and 1990s, parties only occasionally used unconscionability to challenge arbitration agreements<sup>36</sup>: appellate courts held contract provisions unconscionable in an average of just 1.67 contract arbitration cases per year between 1980 and 2001.<sup>37</sup>

Things changed with the turn of the millennium. Starting in the early 2000s, courts refused to enforce contracts as unconscionable at a much higher rate—an average of 7.1 cases per year between 2002 and 2012.<sup>38</sup> One scholar found a “nearly tenfold” increase in the number of unconscionability cases brought between 1990 and 2008.<sup>39</sup> Most recently, from 2012 to 2014, the highest courts in nine states invalidated contract provisions as unconscionable a total of twelve times.<sup>40</sup>

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<sup>34</sup> See, e.g., Anne Fleming, *The Rise and Fall of Unconscionability as the “Law of the Poor,”* 102 GEO. L.J. 1383, 1386 (2013) (“Looking back, it is clear that the [unconscionability] doctrine reached the height of its influence within the decade following *Williams*.”).

<sup>35</sup> See DiMatteo & Rich, *supra* note 18, at 1100-01 (finding no statistically significant change between the success rate of unconscionability claims in the period of 1968 to 1980 and the period of 1991 to 2003).

<sup>36</sup> Landrum, *supra* note 32, at 778; see also, e.g., Stephen A. Broome, *An Unconscionable Application of the Unconscionability Doctrine: How the California Courts Are Circumventing the Federal Arbitration Act*, 3 HASTINGS BUS. L.J. 39, 48 (2006) (finding that California appellate courts from 1982 through 2006 held arbitration provisions unconscionable 47% of the time and ordinary contracts unconscionable 11% of the time). See generally Charles L. Knapp, *Blowing the Whistle on Mandatory Arbitration: Unconscionability as a Signaling Device*, 46 SAN DIEGO L. REV. 609 (2009) (studying the increase in use and success of unconscionability arguments from 1990 through 2008).

<sup>37</sup> My calculations are based on results in the “Total Unc” column of Table 1 in Landrum, *supra* note 32, at 804 tbl.1 (documenting cases finding provisions unconscionable in twenty states).

<sup>38</sup> *Id.* Using this data set, these results have a p-value of 0.0314. See also *id.* at 778 (“[T]he number of unconscionability cases involving arbitration agreements climbed steadily between 2002 and 2008. After the peak in 2008, the number of unconscionability cases involving arbitration agreements declined somewhat and appears to have stabilized, at least for now.”).

<sup>39</sup> Knapp, *supra* note 36, at 622.

<sup>40</sup> See *Gulfico of Louisiana, Inc. v. Brantley*, 2013 Ark. 367, at 11-12, 430 S.W.3d 7, 12 (finding lending provisions unconscionable because the borrowers were incapable of making payments even before the contract was signed); *Schnuerle v. Insight Commc'ns Co.*, 376 S.W.3d 561, 579 (Ky. 2012) (holding unconscionable a provision in an internet service provider agreement requiring confidentiality with respect to result of arbitration); *Feeney v. Dell Inc.*, 989 N.E.2d 439, 463-64 (Mass. 2013) (holding class action waiver unconscionable because it made plaintiffs' claims effectively nonremediable), *abrogated by* *Am. Express v. Italian Colors Rest.*, 133 S. Ct. 2304 (2013); *Caplin Enters. v. Arrington*, 2011-CT-01932-SCT (¶ 19) (Miss. 2014) (concluding that an arbitration provision was unconscionable because it included fee-shifting provisions, lacked mutuality of obligation to arbitrate, and limited damages); *Brewer v. Mo. Title Loans*, 364 S.W.3d 486, 495-96 (Mo. 2012) (finding a waiver of a right to participate in a class action in a loan agreement unconscionable); *Kelker v. Geneva-Roth Ventures*, 2013 MT 62, ¶¶ 4, 37-38, 369 Mont. 254, 303 P.3d 777 (holding a payday loan agreement unconscionable for charging an interest rate of 780%); *State ex rel. King v. B & B Inv. Grp.*, 2014-NMSC-024, ¶ 45, 329 P.3d 658 (N.M. 2014) (holding subprime lending contract charging over 1000% interest unconscionable); *Flemma v. Halliburton Energy Servs.*, 2013-NMSC-022, ¶ 25, 303 P.3d 814 (holding arbitration provision unconscionable



Additionally, litigants are bringing far more claims based on unconscionability now than before. From 2002 to 2012, state courts considered an average of 28.3 claims annually, compared to just 8.67 between 1980 and 2001.<sup>41</sup> This increase likely reflects lawyers' recognition of courts' greater receptiveness to the unconscionability doctrine. However, it may also, or instead, reflect greater incidence of contracts of adhesion, greater resistance to arbitration, or other increases in violations of consumers' rights.

In addition to the *number* of successful claims, the *percentage* of claims that turn out to be successful has also sharply increased: in one recent survey, courts found contract provisions unconscionable in approximately 23% of cases considering an unconscionability claim.<sup>42</sup>

### B. *The Origins of Unconscionability*

Although the doctrine is “new” in the sense that it is being used in new ways and with increased frequency, it dates back to the seventeenth century.<sup>43</sup> It began in English courts of equity and was often used interchangeably with public policy.<sup>44</sup> It burgeoned in the English common law in *Earl of Chesterfield v. Janssen* as a way for courts to invalidate a contract “such as no man in his senses and not under delusion would make on the one hand, and as no honest and fair man would accept on the other.”<sup>45</sup> This oft-quoted statement was actually dicta; the chancellor enforced the debt agreement in that case because the disadvantaged party made it “fully informed and with his eyes open”<sup>46</sup>—language American courts later echoed.<sup>47</sup> Nevertheless, this early example

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and therefore void as opposed to public policy); *Venture Cotton Coop. v. Freeman*, 435 S.W.3d 222, 230 (Tex. 2014) (refusing to enforce assignment of arbitration costs clause as unconscionable because it was not in conformity with statutory provisions governing the waiver of procedural rights); *Hill v. Garda CL Nw., Inc.*, 308 P.3d 635, 638–40 (Wash. 2013) (holding labor agreement provisions giving just fourteen days to bring a claim and assigning all arbitration costs to employees unconscionable); *Brown v. MHN Gov't Servs.*, 306 P.3d 948, 956–58 (Wash. 2013) (applying California law to hold the statute of limitations, arbitrator selection, and fee shifting provisions unconscionable); *Gandee v. LDL Freedom Enters.*, 293 P.3d 1197, 1201–02 (Wash. 2013) (refusing to enforce arbitration provision assigning costs to consumer that were prohibitive, and giving only thirty days to bring a claim).

<sup>41</sup> Landrum, *supra* note 32, at 804 tbl.1.

<sup>42</sup> *Id.* at 779.

<sup>43</sup> See Amy J. Schmitz, *Embracing Unconscionability's Safety Net Function*, 58 ALA. L. REV. 73, 80–82 (2006) (describing the origins of unconscionability).

<sup>44</sup> See *Rivera v. Am. Gen. Fin. Servs.*, 2011-NMSC-033, ¶ 43, 150 N.M. 398, 259 P.3d 803 (“Unconscionability is an equitable doctrine, rooted in public policy . . . .” (citation omitted)).

<sup>45</sup> (1750) 28 Eng. Rep. 82, 100; Schmitz, *supra* note 43, at 81–82 (discussing the *Earl of Chesterfield v. Janssen* case).

<sup>46</sup> *Janssen*, 28 Eng. Rep. at 102.

<sup>47</sup> See, e.g., *Wm. R. Clarke Corp. v. Safeco Ins. Co. of Am.*, 938 P.2d 372, 384 (Cal. 1997) (“This record shows the parties entered into their agreements voluntarily with their eyes open.”).

demonstrates the two-pronged analysis under the doctrine: some procedural “defect” had to accompany the substantive harshness for the court to intervene.

However, in other cases, the presence of a procedural defect seemed almost irrelevant. In *Twisleton v. Griffith*, a court refused to enforce a son’s contract selling his remainder interest in his father’s estate because the contract would have prevented the estate from being passed on to his heirs.<sup>48</sup> The court found the relief necessary to prevent “unconscionable practices,” recognizing that the contract would have a serious impact on third parties.<sup>49</sup> However, its minimal analysis was indistinct from a public policy analysis.

Some early American cases considered the concept of unconscionability with similarly ambiguous analyses.<sup>50</sup> In *Hume v. United States*, the Supreme Court considered an unconscionability argument by a seller of goods to a government hospital who alleged that the contract for sale had mistakenly substituted sixty cents per *hundred weight* rather than sixty cents per *pound*.<sup>51</sup> The resulting price for his goods was thus drastically lower than market price.<sup>52</sup> On appeal, the Supreme Court rejected the seller’s unconscionability argument, finding that he had knowingly and willfully agreed to the lower price.<sup>53</sup> Though apparently nodding to the need for a procedural defect to satisfy the unconscionability doctrine, the Court did not explicitly recognize the dual prongs of the doctrine, nor did it describe unconscionability in any way that might distinguish it from public policy.

### 1. *Railroad Co. v. Lockwood* and Contracts of Adhesion

The seeds for the modern unconscionability doctrine were sown in the late-nineteenth century case *Railroad Co. v. Lockwood*.<sup>54</sup> Although the Supreme Court used public policy, not unconscionability, to void contract provisions in that case,<sup>55</sup> it employed some of the hallmarks of modern

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<sup>48</sup> (1716) 24 Eng. Rep. 403, 403-04.

<sup>49</sup> *Id.* at 404.

<sup>50</sup> In early America, the unconscionability doctrine was seldom invoked. See JOSEPH M. PERILLO, CORBIN ON CONTRACTS § 29.2, at 380 (rev. ed. 2002) (“In general . . . courts of law did not directly condemn a contract as unconscionable but resorted to imaginative flanking devices to defeat the offending contract” including “failure of consideration[,] . . . lack of mutual assent, duress or misrepresentation . . . .”); Landrum, *supra* note 32, at 761-62 (noting the increase in courts’ willingness to find contracts unconscionable).

<sup>51</sup> 132 U.S. 406, 407 (1889).

<sup>52</sup> *Id.*

<sup>53</sup> *Id.* at 415.

<sup>54</sup> 84 U.S. (17 Wall.) 357 (1873) (Bradley, J.); see Barnes, *supra* note 1, at 132 (discussing *Lockwood* as an early example of courts dealing with contracts of adhesion).

<sup>55</sup> See *Lockwood*, 84 U.S. (17 Wall.) at 380 (“[T]he conditions imposed by common carriers ought not to be adverse (to say the least) to the dictates of public policy and morality.”).

unconscionability analysis: the Court accounted for the consumer's lack of knowledge of the terms and recognized the impact mass-marketed contracts can have on other consumers. These elements would become important elements of contemporary unconscionability doctrine.

In *Lockwood*, the Court considered a contract between a cattle drover and a railroad shipping company.<sup>56</sup> The contract allowed the cattle drover to travel for free with his cattle from Buffalo to Albany, but also required him to give up his right to sue the shipper for any injury caused by the shipper's negligence.<sup>57</sup> The Court noted that the cattle drover had no "reasonable and practicable alternative" to the shipper, which was a powerful railroad corporation,<sup>58</sup> and thus had no "real freedom of choice" with respect to the contract's terms.<sup>59</sup> The Court used surprisingly modern language:

The carrier and his customer do not stand on a footing of equality. The latter is only one individual of a million. He cannot afford to higggle or stand out and seek redress in the courts. His business will not admit such a course. He prefers, rather, to accept any bill of lading, or sign any paper the carrier presents; often, indeed, without knowing what the one or the other contains. In most cases, he has no alternative but to do this, or abandon his business. In the present case, for example, the freight agent of the company testified that though they made forty or fifty contracts every week like that under consideration, and had carried on the business for years, no other arrangement than this was ever made with any drover. [To decline the contract would require drovers to pay high tariffs for their transportation.] Of course no drover could afford to pay such tariff rates. This fact is adverted to for the purpose of illustrating how completely in the power of the railroad companies parties are; and how necessary it is to stand firmly by those principles of law by which the public interests are protected.<sup>60</sup>

Moreover, the fact that the other local drovers "all signed similar agreements" only further demonstrated the drover's lack of choice.<sup>61</sup> Every hallmark of a contract of adhesion was present: unequal bargaining power, the presence of boilerplate language, the drover's lack of knowledge about the contract's contents, and the drover's economic straits.

The case demonstrates that the problem of contracts of adhesion was common even as early as the late-nineteenth century; the Court reviewed many cases about the transportation of drovers with their cattle that involved

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<sup>56</sup> *Id.* at 358.

<sup>57</sup> *Id.* at 359.

<sup>58</sup> *Id.* at 379; *see also id.* at 380 ("[The shipping industry] is mostly concentrated in a few powerful corporations, whose position in the body politic enables them to control it. They do, in fact, control it, and impose such conditions upon travel and transportation as they see fit, which the public is compelled to accept.").

<sup>59</sup> *Id.* at 379.

<sup>60</sup> *Id.*

<sup>61</sup> *Id.* at 358, 381.

contracts shielding carriers from liability.<sup>62</sup> It also shows that courts were aware of the challenge these contracts posed to their notions about fair contracting.

With great prescience, the Court also noted the potential positive market effects of such liability-shielding clauses:

A modification of the strict rule of responsibility, exempting the carrier from liability for accidental losses, where it can be safely done, enables the carrying interest to reduce its rates of compensation; thus proportionally relieving the transportation of produce and merchandise from some of the burden with which it is loaded.<sup>63</sup>

In other words, the removal of liability might pass on benefits to consumers in the form of cheaper rates. The Court recognized this possible economic advantage of such clauses—a feature that would motivate many opponents of courts meddling in contracts of adhesion a century later.

In addition to market benefits, the Court acknowledged the right, seen as fundamental at the time, to contract freely:

To say the parties have not a right to make their own contract, and to limit the precise extent of their own respective risks and liabilities, in a matter no way affecting the public morals, or conflicting with the public interests, would, in [the Court's] judgment, be an unwarrantable restriction upon trade and commerce, and a most palpable invasion of personal right.<sup>64</sup>

But the *Lockwood* Court rejected the idea that this right is free of limitations, recognizing a larger social interest in limiting this type of contract:

Is it true that the public interest is not affected by individual contracts of the kind referred to? Is not the whole business community affected by holding such contracts valid? If held valid, the advantageous position of the companies exercising the business of common carriers is such that it places it in their power to change the law of common carriers in effect, by introducing new rules of obligation.<sup>65</sup>

The Court insisted that contracts and the rules that govern them do not just affect the parties to the contracts, but also the entire industry. In part on these grounds, the Court found the provision insulating the railroad from liability void as against public policy.<sup>66</sup>

In some ways, the *Lockwood* Court's reasoning is archetypal of public policy analysis. The Court referenced legislative intent and purposes, frequently noting statutory and common law efforts to impose liability on common carriers.<sup>67</sup> The Court also rejected the idea that the expectations of

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<sup>62</sup> *Id.* at 361-72.

<sup>63</sup> *Id.* at 360.

<sup>64</sup> *Id.* at 378.

<sup>65</sup> *Id.* at 378-79.

<sup>66</sup> *Id.* at 381-82.

<sup>67</sup> *See, e.g., id.* at 373 (discussing the English Railway and Canal Traffic Act); *id.* at 377-78 (noting the common law treatment of common carriers as insurers); *id.* at 381 (describing how courts require contracts to be "just and reasonable").

the parties should govern the interpretation of the contract, referring back to the contract being “absolute in its terms.”<sup>68</sup>

Although the Court held the provision unenforceable against public policy with no mention of unconscionability, the case foreshadowed later developments in the unconscionability doctrine. The Court recognized the objective assent model in contract law by holding that the contract was validly formed. But the Court also accounted for the consumer’s lack of knowledge of the terms and recognized the impact a ruling on one contract can have on other consumers.<sup>69</sup> These would become important elements of the unconscionability doctrine a century later.

*Lockwood* did not launch a new approach to contracts of adhesion generally, but rather its impact was confined to the law governing common carriers. Although the Court was surprisingly candid about its consideration of the parties’ economic situations, its reasoning would not extend to contracts of adhesion used in other kinds of businesses; essential to the *Lockwood* Court’s conclusion was its finding that the railroad was a common carrier, not an ordinary bailee, and therefore was required to operate under the common law standard of being an insurer.<sup>70</sup> This particularized application of a rule is paradigmatic of the preformalist thinking of the nineteenth century.<sup>71</sup> Indeed, as the common law became increasingly conceptual and generalized during the late-nineteenth century—a movement labeled legal formalism—some pushed to allow common carriers to contract out of strict liability in order to make contracting in transportation more similar to the general maxims in contract law.<sup>72</sup> The concepts undergirding the Court’s reasoning in *Lockwood* were ultimately buried under the more general concepts of freedom to contract that dominated the rest of contract law.

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<sup>68</sup> *Id.* at 362; see also Barnes, *supra* note 1, at 134 (“Contract law calls us to enforce promises because they carry the imprimatur of assent. We need not throw out objectivity, but we should be particularly vigilant to the absence of assent in standardized transactions like the one in *Lockwood*.”).

<sup>69</sup> *Lockwood*, 84 U.S. (17 Wall.) at 379.

<sup>70</sup> See *id.* at 376 (rejecting the railroad’s argument that it was a bailee because its business inherently entailed special responsibilities).

<sup>71</sup> See HORWITZ, *supra* note 19, at 11-13 (describing the resistance to generalization, in favor of the law’s organization according to profession and “functional relationship,” in the nineteenth century).

<sup>72</sup> See, e.g., *id.* at 14 (describing how Oliver Wendell Holmes, a proponent of legal categorization, thought strict liability for common carriers was “a merely empirical exception from general doctrine” and therefore that courts should allow common carriers to “contract out” of strict liability, in conformance with the general policy in the common law allowing it).

## 2. Unconscionability and the U.C.C.

The unconscionability doctrine was not fully accepted as a defense to a breach of contract until the promulgation of the Uniform Commercial Code in 1951,<sup>73</sup> which provided,

If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result.<sup>74</sup>

The commentators justified the section on unconscionability with reference to *Campbell Soup Co. v. Wentz*,<sup>75</sup> a case voiding a contract of adhesion on the basis of public policy.<sup>76</sup> In *Campbell Soup*, the Third Circuit considered a contract provision imposed by a powerful company on a relatively powerless farmer requiring specific performance of the sale of his carrots, and held it void as against public policy.<sup>77</sup> The U.C.C. thus linked the trend from *Lockwood* and *Campbell Soup* of using public policy to curb contracts of adhesion with the new concept of unconscionability.

As evidenced by the citation to *Campbell Soup*, U.C.C. section 2-302 was originally intended to address contracts of adhesion.<sup>78</sup> Karl Llewellyn, the chief reporter of the drafting process and a champion of Legal Realism,<sup>79</sup> pushed for a provision that would enable courts to invalidate or weaken the force of many such contracts.<sup>80</sup> Llewellyn had drafted earlier versions of the section, providing that contract provisions that were “unfair and unbalanced” and “not required by the circumstances of the trade” are only enforceable if it can be shown that the nondrafting party knew about them and intended

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<sup>73</sup> See Barnes, *supra* note 1, at 149-50 (“[Unconscionability’s] acceptance as a mainstream doctrine, a ready aid in contract limitation, dates back only to its inclusion in the U.C.C.”).

<sup>74</sup> U.C.C. § 2-302(1) (AM. LAW INST. & NAT’L CONFERENCE OF COMM’RS ON UNIF. STATE LAWS 2014).

<sup>75</sup> 172 F.2d 80 (3d Cir. 1949).

<sup>76</sup> See U.C.C. § 2-302 cmt. 1 (citing *Campbell Soup* for the proposition that unconscionability seeks to prevent “oppression and unfair surprise”).

<sup>77</sup> 172 F.2d at 81, 83.

<sup>78</sup> See Leff, *supra* note 11, at 492 (explaining that early versions of the section were “explicitly made applicable to ‘form clauses’ only” (footnote omitted)).

<sup>79</sup> Allen R. Kamp, *Uptown Act: A History of the Uniform Commercial Code: 1940-49*, 51 SMU L. REV. 275, 276-77 (1997).

<sup>80</sup> See *id.* at 490-91 (discussing the drafting history of section 2-302); *id.* at 488 n.11 (using “draftsman” to refer to Karl Llewellyn throughout, but conceding that “[t]he part Professor Llewellyn played in the final form of § 2-302 is hard to assess”). This article refers to Llewellyn by name, rather than using Leff’s moniker, “draftsman,” because Llewellyn’s influence was undoubtedly great in these early drafts. See *id.* (noting that Karl Llewellyn was the primary draftsman at the early stages of the U.C.C., especially of the Sales article).

them to modify the general provisions of the U.C.C.<sup>81</sup> A 1943 version of section 2-302 specifically addressed contracts of adhesion, providing that they would be enforceable except when unconscionable.<sup>82</sup> The commentary to the early versions sought to address the problem that the signer often did not know what the contract contained.<sup>83</sup>

Facing opposition from other drafters, Llewellyn's proposed limitation on such contracts was eventually reduced to declaring contracts as a whole, or clauses within contracts, unenforceable if found "unconscionable."<sup>84</sup> This final version did not explicitly orient unconscionability toward contracts of adhesion, nor did it offer much guidance to courts about the concept's jural meaning.

This forced ambiguity is perhaps ironic, as section 2-302 was an explicit attempt by the Legal Realists to make judicial reasoning more transparent.<sup>85</sup> The draftsmen explained their objective in an official comment to the section:

[U.C.C. section 2-302] is intended to make it possible for the courts to police explicitly against the contracts or clauses which they find to be unconscionable. In the past such policing has been accomplished by adverse construction of language, by manipulation of the rules of offer and acceptance or by determination that the clause is contrary to public policy or to the dominant purpose of the contract. This section is intended to allow the court to pass on the unconscionability of the contract or particular clause therein and to make a conclusion of law as to its unconscionability.<sup>86</sup>

Llewellyn wanted to eliminate the ambiguity created by courts' pretenses at simply enforcing the law as handed down to them.<sup>87</sup> Rather than using ill-fitting traditional doctrines to hold contracts of adhesion unenforceable, Llewellyn hoped to provide a doctrine that would allow courts to refuse to enforce contracts of adhesion explicitly.<sup>88</sup>

Although many Realists decried legal concepts, it would be a mistake to presume that Llewellyn's intent to create a new concept in American contract

<sup>81</sup> *See id.* (quoting the 1941 draft of the U.C.C.).

<sup>82</sup> *Id.* at 492.

<sup>83</sup> *See, e.g., id.* (describing the 1943 version's comment as being concerned about whether both parties examine contract provisions before agreeing to them).

<sup>84</sup> U.C.C. § 2-302(1) (AM. LAW INST. & NAT'L CONFERENCE OF COMM'RS ON UNIF. STATE LAWS 2014); *see also* Kamp, *supra* note 79, at 306-08 (explaining that the term "unconscionability" was added at another drafter's suggestion, but that Llewellyn welcomed it); Leff, *supra* note 11, at 489-92 (highlighting the evolution in language towards "unconscionable" in the predecessors to section 2-302).

<sup>85</sup> *Cf.* Kamp, *supra* note 79, at 302 ("Another of Llewellyn's goals was to reform cont[r]acts by discarding obsolete formalisms and instituting modern efficiency and flexibility.").

<sup>86</sup> Leff, *supra* note 11, at 497; *see also supra* note 80.

<sup>87</sup> *See* Leff, *supra* note 11, at 526-27 (describing Llewellyn's recognition that judges' desires to come to good results can have a "distorting effect on legal doctrine").

<sup>88</sup> *See* Schmitz, *supra* note 43, at 86-87 (explaining that Llewellyn's early drafts of what came to be U.C.C. section 2-302 "targeted unintended bargains and use of form contracts to create one-sided 'private codifications'").

law was contrary to his realist project.<sup>89</sup> It is true that Llewellyn pointed out the pitfalls of concept-based legal reasoning, famously arguing that “to classify is to disturb.”<sup>90</sup> He also feared that concepts would “take on an appearance of . . . inherent value” and would “twist any fresh observation of data into conformity with the terms of the categories.”<sup>91</sup> Llewellyn preached extreme caution with regard to legal concepts.

But this oversimplifies Llewellyn’s intentions. Llewellyn did not object to concepts per se, but rather to the blind application of concepts to particular factual situations without concern for their purposes.<sup>92</sup> He was frustrated with the opaque reasoning of the Formalists who, he believed, employed rusty doctrines that distorted the real purpose behind the rules.<sup>93</sup> He argued that “a concept, as I understand it, is built for a purpose. It is a thinking tool. It is to make your data more manageable in doing something, in getting somewhere with them.”<sup>94</sup> Indeed, Llewellyn’s project was not to remove concepts from the law, but rather to shift the “focal point of legal discussion” to judicial behavior and its practical effects.<sup>95</sup> He rejected the formalist view that rules on paper constituted the law but embraced the view that law was made up of various practical as-applied rules.<sup>96</sup> Thus, Llewellyn may have been enthusiastic about the infusion of a new concept into the common law inasmuch as the concept more accurately revealed what judges were actually doing and would be used and assessed with an eye toward its practical effects.<sup>97</sup>

Indeed, Llewellyn explicitly recognized the importance of concepts, calling them “not only . . . existent, but . . . highly useful, indeed vital.”<sup>98</sup>

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<sup>89</sup> See, e.g., HORWITZ, *supra* note 19, at 200 (“Hostility to conceptualism was a hallmark of Legal Realist criticism.”); BRIAN Z. TAMANAHA, *BEYOND THE FORMALIST–REALIST DIVIDE: THE ROLE OF POLITICS IN JUDGING* 59 (2010) (stating that formalist critics argued that mechanical concepts were often used to cover up decisions that were based on ideology).

<sup>90</sup> KARL N. LLEWELLYN, *A Realistic Jurisprudence—The Next Step*, 30 COLUM. L. REV. 431, 453 (1930).

<sup>91</sup> *Id.*

<sup>92</sup> See *id.* at 438 (arguing that concepts “have had great value” inasmuch as they direct thinkers to consider a law’s purpose).

<sup>93</sup> See Schauer, *supra* note 21, at 532 (“[Llewellyn] believed that formalism, as the obeisance to the literal language of a rule, could frustrate the rule’s purpose and lead to difficulties where the practical consequences of the decision would indicate a different result.”).

<sup>94</sup> Llewellyn, *supra* note 90, at 431.

<sup>95</sup> *Id.* at 442-43.

<sup>96</sup> See Frederick Schauer, *Legal Realism Untamed*, 91 TEX. L. REV. 749, 766 (2013) (explaining that Llewellyn denied that “the real rules” were the rules that “happened to be written down in law books”).

<sup>97</sup> See Llewellyn, *supra* note 90, at 452 (arguing that a written law, or “official formulation,” does not have “value in itself” but rather derives meaning “in terms of its workings,” which is evaluated by comparison with “the results desired”); see also Leff, *supra* note 2, at 137-40 (arguing that to call contracts of adhesion “contracts” at all is to apply an overly general and ill-fitting definition of “contract” to the transaction).

<sup>98</sup> KARL N. LLEWELLYN, *THE THEORY OF RULES* 49 (Frederick Schauer ed., 2011).



He also argued that those rules that succeeded in constraining officials, in getting them to treat like cases alike, were better than those that failed to do so.<sup>99</sup> Perhaps much more than other Realists of his time, Llewellyn embraced the potential for constraint that legal rules imposed. Therefore, it was entirely consistent with his philosophy to propose a new concept of unconscionability that might push judges to decide cases differently.

### 3. The Years of Ambiguity for Unconscionability

Since Llewellyn's infusion of unconscionability into American law through the U.C.C.,<sup>100</sup> courts have applied the unconscionability doctrine broadly to hold unenforceable many types of provisions in adhesive contracts, including lack of mutuality regarding obligations or remedial options,<sup>101</sup> limitations on remedies,<sup>102</sup> imposition of excessive fees, fee-shifting, or excessively high interest rates,<sup>103</sup> selection of an extremely inconvenient

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<sup>99</sup> *Id.* at 74-75.

<sup>100</sup> The Second Restatement of Contracts, in 1981, followed the U.C.C. by adding an unconscionability provision:

If a contract or term thereof is unconscionable at the time the contract is made a court may refuse to enforce the contract, or may enforce the remainder of the contract without the unconscionable term, or may so limit the application of any unconscionable term as to avoid any unconscionable result.

RESTATEMENT (SECOND) OF CONTRACTS § 208 (AM. LAW INST. 1981). In addition to the Restatement, all states but Louisiana adopted the U.C.C. provision in some form. Schmitz, *supra* note 43, at 89.

<sup>101</sup> See, e.g., *E-Z Cash Advance, Inc. v. Harris*, 60 S.W.3d 436, 442 (Ark. 2001) (concluding that lack of mutuality in an arbitration agreement rendered it unenforceable); *Armendariz v. Found. Health Psychcare Servs., Inc.*, 6 P.3d 669, 689-99 (Cal. 2000) (finding nonmutual arbitration clause substantively unconscionable); *Iwen v. U.S. W. Direct, Inc.*, 1999 MT 63, ¶ 32, 293 Mont. 512, 977 P.2d 989, 996 (“[T]his case presents a clear example of an arbitration provision that lacks mutuality of obligation, is one-sided, and contains terms that are unreasonably favorable to the drafter.”); *Arnold v. United Cos. Lending Corp.*, 511 S.E.2d 854, 861-62 (W. Va. 1998) (finding arbitration clause unenforceable in part because the parties’ rights were “inherently inequitable” (citation omitted)). Prior to 1990, some states applied mutuality of obligation as an independent doctrine. See Stempel, *supra* note 32, at 804 n.166 (discussing courts’ uses of the doctrine of mutuality of obligation in the context of arbitration clauses).

<sup>102</sup> See, e.g., *Mandel v. Household Bank (Nev.) Nat’l Ass’n*, 129 Cal. Rptr. 2d 380, 385-86 (Ct. App. 2003) (finding clause that restricted access to class actions to remedy breaches unconscionable).

<sup>103</sup> See, e.g., *Alexander v. Anthony Int’l, L.P.*, 341 F.3d 256, 263 (3d Cir. 2003) (holding that an arbitration clause’s requirement that the loser pay the opponent’s legal fees was substantively unconscionable); *Kelker v. Geneva-Roth Ventures*, 2013 MT 62, ¶¶ 4, 37-38, 369 Mont. 254, 303 P.3d 777 (holding an interest rate of 780% unconscionable); *State ex rel. King v. B & B Inv. Grp.*, 2014-NMSC-024, ¶ 49, 329 P.3d 658 (N.M. 2014) (concluding that loan agreements containing “quadruple-digit interest rate[s]” were unconscionable).

forum,<sup>104</sup> and unduly short deadlines for filing claims.<sup>105</sup> The concept has also been used as a tool to protect the poor in particular, especially from usurious loan or credit agreements.<sup>106</sup>

This has led some to argue that unconscionability is not a coherent doctrine at all, but rather a conglomeration of factors, enumerated and checked off by courts.<sup>107</sup> The Montana Supreme Court opined that “unconscionability lacks a succinct or precise definition” but rather was defined by a list of elements,<sup>108</sup> while the Supreme Court of Texas explained that unconscionability is “not a concept, but a determination to be made in light of a variety of factors not unifiable into a formula.”<sup>109</sup> The Wisconsin Supreme court stated that “[n]o single, precise definition of substantive unconscionability can be articulated.”<sup>110</sup> Many courts still view the doctrine as either a subsidiary of, or even duplicative of, public policy. For example, the New Mexico Supreme Court explained that the flexibility in unconscionability comes from its roots as “an equitable doctrine, rooted in public policy.”<sup>111</sup>

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<sup>104</sup> See, e.g., *Nagrampa v. Mailcoups, Inc.*, 469 F.3d 1257, 1287 (9th Cir. 2006) (noting that while forum selection clauses are generally enforceable, if the forum is “unduly oppressive” or the clause has “the effect of shielding the stronger party from liability,” a clause may be found unconscionable (citations omitted)).

<sup>105</sup> See, e.g., *Hill v. Garda CL Nw., Inc.*, 308 P.3d 635, 639 (Wash. 2013) (holding that a fourteen-day limitation on filing a claim was unconscionable). Many of the cases and criteria are provided in Stempel, *supra* note 32, at 803-07.

<sup>106</sup> See, e.g., *Gulfc0 of La., Inc. v. Brantley*, 2013 Ark. 367, at 12, 430 S.W.3d 7, 14 (holding a loan agreement unconscionable because the stronger party knew that there was no reasonable probability that the buyers would be able to repay it); Fleming, *supra* note 34, at 1432-37 (discussing the aftermath of *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445 (D.C. Cir. 1965), and arguing that unconscionability as the “law of the poor” was used temporarily, before it was neutralized into a law for consumers, regardless of wealth).

<sup>107</sup> See, e.g., DiMatteo & Rich, *supra* note 18, at 1075 (“As in most cases of judicial application of legal standards, the courts will often enumerate a number of factors that they use in applying the standard to the novelty of real world disputes.”).

<sup>108</sup> *Kelker*, 2013 MT 62 at ¶ 24 (citation omitted).

<sup>109</sup> *Venture Cotton Coop. v. Freeman*, 435 S.W.3d 222, 228 (Tex. 2014) (quoting 27 STEPHEN COCHRAN, TEXAS PRACTICE SERIES: CONSUMER RIGHTS AND REMEDIES § 4.2 (3d ed. 2002)).

<sup>110</sup> *Wis. Auto Title Loans, Inc. v. Jones*, 2006 WI 53, ¶ 36, 290 Wis. 2d 514, 714 N.W.2d 155.

<sup>111</sup> *Rivera v. Am. Gen. Fin. Servs.*, 2011-NMSC-033, ¶ 43, 150 N.M. 398, 259 P.3d 803. The United States Supreme Court viewed California’s doctrine of unconscionability similarly when it held it to be preempted by the Federal Arbitration Act in *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011). The Supreme Court referred to applying “the general principle of unconscionability or public-policy disapproval,” *id.* at 1747, effectively equating the two. *Cf. id.* at 1750 (calling various elements of California’s analysis “toothless and malleable” and as having “no limiting effect”). Justice Thomas’s concurrence considers the nature of an unconscionability defense, and almost explicitly calls it analytically indistinct from public policy. *See id.* at 1755-56 (Thomas, J. concurring) (summarizing and responding to the lower court’s analysis by saying, “[r]efusal to enforce a contract for public-policy reasons does not concern whether the contract was properly made”).

Courts' vague definitions of unconscionability invite further criticism. Courts look for contract terms that are "harsh[]," "unfair," "unreasonabl[e]," "one-sided," or "oppressive" to indicate substantive unconscionability.<sup>112</sup> One court defined an unconscionable contract as "one abhorrent to good morals and conscience."<sup>113</sup> As one scholar stated, "[u]nconscionability begins and ends with the conscience."<sup>114</sup> Although ambiguity is not unique to the unconscionability doctrine—indeed, the U.C.C. repeats the requirement of reasonableness throughout<sup>115</sup>—the primary objection leveled against the doctrine of unconscionability is that it is *nothing but* reference to ambiguous norms—in other words, that it lacks any core jural meaning.<sup>116</sup> Numerous scholars have argued that the ambiguity causes unpredictability and creates

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<sup>112</sup> See *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445, 449 (D.C. Cir. 1965) ("Unconscionability . . . include[s] an absence of meaningful choice on the part of one of the parties together with contract terms which are *unreasonably* favorable to the other party." (emphasis added)); *Basulto v. Hialeah Auto.*, 141 So.3d 1145, 1160-61 (Fla. 2014) ("In the typical case of consumer adhesion contracts, where there is virtually no bargaining between the parties, the commercial enterprise or business responsible for drafting the contract is in a position to unilaterally create *one-sided* terms that are *oppressive* to the consumer, the party lacking bargaining power." (emphasis added)); *id.* at 1159 (employing a sliding-scale approach in which procedural unconscionability is assessed "in proportion to the greater *harshness* or *unreasonableness* of the substantive terms themselves" (emphasis added) (citation omitted)); *id.* at 1157-58 ("[T]he *unreasonableness* of the terms is often referred to as substantive unconscionability . . . ." (emphasis added)); *Rodriguez v. Raymours Furniture Co.*, 93 A.3d 760, 766 (N.J. Super. Ct. App. Div. 2014) ("[A] contract is unenforceable if its terms are manifestly *unfair* or *oppressive* and are dictated by a dominant party." (emphasis added) (citation omitted)); *State ex rel. King v. B & B Inv. Grp., Inc.*, 2014-NMSC-024, ¶ 32, 329 P.3d 658 (N.M. 2014) ("Contract provisions that unreasonably benefit one party over another are substantively unconscionable."). *But see* *Commercial Real Estate Inv. v. Comcast of Utah II, Inc.*, 2012 UT 49, ¶ 44, 285 P.3d 1193, 1203-04 ("It is not sufficient for the liquidated damages clause to be 'unreasonable or more advantageous to one party.' Instead, 'we consider whether a contract's terms are so one-sided as to oppress or unfairly surprise an innocent party or whether there exists an overall imbalance in the obligations and rights imposed by the bargain according to the mores and business practices of the time and place.'" (citation omitted)).

<sup>113</sup> *Results Oriented, Inc. v. Crawford*, 538 S.E.2d 73, 80 (Ga. Ct. App. 2000) (citation omitted).

<sup>114</sup> See *Barnes*, *supra* note 1, at 161.

<sup>115</sup> See *id.* at 149 n.121 ("What better way to define a legal concept that is overly broad than to use overly broad substitute words. This vague definition shows not only how much room has been left for the courts to shape and mold the concept, but also how effective the drafters of the U.C.C. were in accomplishing a shift from the pretextual to the explicit in the courts' reasoning.").

<sup>116</sup> See Evelyn L. Brown, *The Uncertainty of U.C.C. Section 2-302: Why Unconscionability Has Become a Relic*, 105 COM. L.J. 287, 293 (2000) (noting that the U.C.C. and its comments fail to provide a "clear-cut definition for courts to follow"); see also Balganesch & Parchomovsky, *supra* note 23, at 18 ("Most concepts in the common law . . . have a jural meaning that is discernible through the semantic meaning of the concept and its common usage within the interpretive community, when viewed from an internal point of view.").

opportunities for improvident judicial meddling.<sup>117</sup> Like public policy, they argue, it is merely a hollow vehicle for normative inputs.

A recent trend of using the two-pronged analysis as a sliding scale only further muddies the doctrine. An increasing number of courts analyze procedural and substantive unconscionability such that a small amount of one can be compensated by a large amount of the other, as long as the total unconscionability “score” is high enough.<sup>118</sup> The sliding scale method provides even greater flexibility, allowing courts to intervene when they see particularly harsh terms but relatively benign procedural defects and vice versa.<sup>119</sup> At least thirteen states apply the sliding scale approach, and the number is growing.<sup>120</sup> This change will only exacerbate criticisms that the unconscionability doctrine is amorphous and unpredictable.

Critics might say that this amorphousness—this use of the concept with respect to particular factual situations rather than in accordance with a clear rule-based formulation—illustrates the problem with the realist project. Although this accusation would be unfairly leveled against Karl Lewellyn, who did not resist legal concepts *qua* concepts,<sup>121</sup> it might be more fairly leveled against some of his more adamant contemporaries, such as Felix Cohen. Cohen believed that concepts and legal rules distorted the law and should be abandoned in favor of practical, policy-oriented reasoning.<sup>122</sup> The Realists’ opponents charge that, by resisting concepts, the Realists directed the courts to abandon the predictability that results from following rules

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<sup>117</sup> See Leff, *supra* note 11, at 488 (arguing that U.C.C. section 2-302 is fraught with “amorphous unintelligibility” which led to its “final irrelevance”); *id.* at 496 (“[T]he net result is to make it possible under the section [of the U.C.C. defining unconscionability] to strike a single provision in a contract even if it had been specifically bargained about and even if it were not forbidden by any established doctrine of illegality or public policy, solely on the basis of an ad hoc judicial determination of substantive ‘unconscionability.’”); see also Brown, *supra* note 116, at 292 (arguing that section 2-302’s lack of a definition for unconscionability leaves courts without enough guidance to handle unconscionability cases). For an argument that the concept’s ambiguity is an asset rather than a flaw, see Schmitz, *supra* note 43, at 74 (seeking “to defend and protect unconscionability’s flexibility”).

<sup>118</sup> See Lonegrass, *supra* note 10, at 6-7 (describing the “recent swell” of courts employing this sliding-scale approach).

<sup>119</sup> *Id.*

<sup>120</sup> See *id.* at 6 n.23 (citing cases from California, Illinois, Missouri, Nevada, New Jersey, New Mexico, North Carolina, North Dakota, Vermont, Washington, West Virginia, and Wisconsin, that have adopted or reaffirmed the sliding scale approach). The Supreme Court of Florida also recently applied the sliding scale approach in *Basulto v. Hiialeah Auto.*, 141 So.3d 1145, 1159 (Fla. 2014).

<sup>121</sup> See *supra* notes 90-95 and accompanying text.

<sup>122</sup> See Felix Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809, 833-45 (1935) (expressing the author’s prediction, and hope, that “skill in the manipulation of legal concepts” will be replaced by a “functional method” that involves looking to the consequences of a legal decision).

based on classification.<sup>123</sup> They also argue that these Realists ignored the way that legal concepts interact with each other in a systematic web.<sup>124</sup>

For the first fifty years of its use, unconscionability presented just what Cohen defended: a policy-oriented analysis devoid of jural meaning. It liberated courts from typical common law jural constraints, allowing them to enforce or refuse to enforce a contractual provision based on the judges' beliefs about whether such enforcement was supported by policy concerns.<sup>125</sup> Unconscionability was perhaps exactly what Cohen saw as the ideal legal tool: a jurisprudence that "deal[t] with issues ethically and responsibly in terms of social policy, one at a time."<sup>126</sup> But before analyzing the recent departure from this freedom toward coherence in a developed jural meaning of unconscionability, it is helpful to understand the normative use to which the concept of unconscionability has been put.

## II. THE NORMATIVE MEANING OF UNCONSCIONABILITY

### A. *An Efficiency-Based Normative Meaning*

To understand the normative meaning of the doctrine, it is worth reviewing the economic criticisms that informed its development. At the same time that courts demonstrated reluctance to invalidate contracts of adhesion in the twentieth century, the law and economics literature praised such contracts.<sup>127</sup> This literature presupposed that freely chosen transactions increase value and that the common law should be oriented to maximize value.<sup>128</sup> Under this framework, supporters of these arguments applauded such contracts for being economically efficient.<sup>129</sup> But by the end of the 1990s,

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<sup>123</sup> See Schauer, *supra* note 21, at 539-45 (explaining that the formalism of rules is "on occasion normatively desirable" because it increases predictability); see also L. L. Fuller, *American Legal Realism*, 82 U. PA. L. REV. 429, 446 (1934) (criticizing Llewellyn for believing that thinking must be directed toward "particular things" rather than concepts).

<sup>124</sup> See Waldron, *supra* note 28, at 28-29 (criticizing Felix Cohen for overlooking the importance of systematicity in the law).

<sup>125</sup> See *supra* note 117 and accompanying text.

<sup>126</sup> Waldron, *supra* note 28, at 30.

<sup>127</sup> See, e.g., Stempel, *supra* note 32, at 822-25 (discussing the prominence of law and economics scholarship about unconscionability between 1967 and 1997).

<sup>128</sup> See e.g., RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 270-71 (7th ed. 2007) (arguing that the common law demonstrates a commitment to efficiency when it incorporates the moral principles that enhance one's ability to maximize personal satisfaction). See generally George L. Priest, *The Common Law Process and the Selection of Efficient Rules*, 6 J. LEGAL STUD. 65, 65 (1977) (describing the tendency of common law towards efficiency).

<sup>129</sup> See Randy E. Barnett, *Consenting to Form Contracts*, 71 FORDHAM L. REV. 627, 630-34 (2002) (citing Todd D. Rakoff, *Contracts of Adhesion: An Essay in Reconstruction*, 96 HARV. L. REV.

scholars were newly aware that some of the assumptions in the law and economics school needed to be adapted because actors are less rational and informed than traditional economists had assumed.<sup>130</sup> Furthermore, scholars realized that in some circumstances, individuals maximizing their own welfare would not actually maximize society's welfare.<sup>131</sup>

Two major critiques of contracts of adhesion have emerged from within the law and economics movement. First, consumers' lack of knowledge about the fine print in contracts of adhesion can inhibit the accurate pricing of those contracts if there are not enough sophisticated consumers to exert market pressure and if those consumers are indistinguishable from ignorant consumers.<sup>132</sup> The assumption that there are enough consumers with sufficient knowledge to exert market pressure underlies free-market arguments,<sup>133</sup> but in the absence of such knowledge, markets are vulnerable to failure because exchanges do not necessarily increase welfare for both parties, since one party may believe she is increasing her welfare, when in fact, she is not.<sup>134</sup>

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1173 (1983)) (summarizing and supporting Todd Rakoff's argument that standard form documents, such as contracts of adhesion, are economically efficient).

<sup>130</sup> See Christine Jolls et al., *A Behavioral Approach to Law and Economics*, 50 STAN. L. REV. 1471, 1488 (1998) (explaining that the law and economics term of "rationality" can mean many things and that the assumptions of rationality are undermined by empirical studies).

<sup>131</sup> Consider, for example, the classic game theory problem posed by the prisoner's dilemma. When each individual pursues the dominant strategy, the total loss is greater than if both prisoners cooperated. ALAN DEVLIN, *FUNDAMENTAL PRINCIPLES OF LAW AND ECONOMICS* 23-25 (2015).

<sup>132</sup> See Douglas G. Baird, *The Boilerplate Puzzle*, 104 MICH. L. REV. 933, 945 (2006) (explaining that it is infeasible to explain the contents of most contracts of adhesion to an average consumer during a purchase, and that this may justify banning those inexplicable clauses); Jaime Dodge, *The Limits of Procedural Private Ordering*, 97 VA. L. REV. 723, 793 (2011) ("[T]he justification for unrestricted bargaining is the presence of a functioning market; while not every consumer needs to make informed choices, a sufficient quantity of informed consumers must be present for a functioning market to exist."); Russell Korobkin, *Bounded Rationality, Standard Form Contracts, and Unconscionability*, 70 U. CHI. L. REV. 1203, 1206 (2003) ("Because buyers are boundedly rational rather than fully rational decision makers, when making purchasing decisions they take into account only a limited number of product attributes and ignore others."); Michael I. Meyerson, *The Reunification of Contract Law: The Objective Theory of Consumer Form Contracts*, 47 U. MIAMI L. REV. 1263, 1270-71 (1993) (explaining that there is no evidence that particularly rigorous shoppers are able to affect the market such that most consumers are protected from unfavorable terms); Alan Schwartz & Louis L. Wild, *Intervening in Markets on the Basis of Imperfect Information: A Legal and Economic Analysis*, 127 U. PA. L. REV. 630, 638-39 (1979) (discussing the market pressure "searchers," or people who examine form contracts for unfavorable terms, can exert on the market in part because it "is usually too expensive for firms to distinguish among extensive, moderate, and nonsearchers").

<sup>133</sup> See, e.g., Schwartz & Wild, *supra* note 132, at 637-38 (arguing that sellers will not offer one-sided terms if there exists a sufficient minority of informed, price-sensitive consumers).

<sup>134</sup> See Barnes, *supra* note 1, at 184 ("If anything, the lack of bargaining and lack of power to bargain suggest a noncompetitive situation in which any resultant harsh terms will impose greater and unforeseen costs on the weaker party.").

Second, if businesses can distinguish between knowledgeable consumers and ignorant consumers, they will offer fairer terms to the knowledgeable than they will to the ignorant, and the presence of knowledgeable consumers in the market will not help the others.<sup>135</sup> Thus, in order for a good to be priced efficiently, businesses must not be able to differentiate between these types of consumers, and there must be enough of them to exert market pressure.

It is possible that contracts of adhesion have actually increased societal welfare. This could be true if, for example, the current assignment of liabilities to businesses through burdensome litigation costs more than the value of the vindicated rights to the consumer-beneficiaries.<sup>136</sup> But it is also possible, as described above, that contracts of adhesion decrease societal welfare by taking rights from consumers that they value at an amount greater than the amount they are trading them for, merely out of misunderstanding.<sup>137</sup>

The argument that contracts of adhesion reduce consumer welfare is furthered by establishing that consumers' failure to learn about contracts' terms is, in fact, rational, because the time it takes consumers to read each contract, plus the time and money it would take to hire an attorney to help the average consumer understand the contract, usually vastly outweighs the likelihood that any term in that contract will harm the consumer.<sup>138</sup> Thus, reasonable

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<sup>135</sup> See Baird, *supra* note 132, at 939 ("At the very least, one should pay attention to whether the market is one in which sellers can discriminate between those buyers who are sophisticated and those who are not.").

<sup>136</sup> This was contemplated by Judge Richard Posner in *Northwestern National Insurance Co. v. Donovan*, when he stated,

We may assume, since the market in surety bonds is a competitive one, that the cost savings that accrue to Northwestern from contractual terms that facilitate the enforcement of one of its bonds will be passed on, in part anyway, to the purchaser of those bonds—the enterprise in which the defendants invested—in the form of lower premium. If so, the defendants were compensated in advance for bearing the burden of which they now complain, and will reap a windfall if they are permitted to repudiate the forum selection clause.

916 F.2d 372, 378 (7th Cir. 1990). No data exists to determine whether this is true; even if it is true in some situations, it would likely vary from market to market.

<sup>137</sup> For example, some law and economics scholars have advocated for the law making transactions more transparent. This would decrease the cost of information such that products could be more accurately priced in the market. See Baird, *supra* note 132, at 949 (explaining that effective legal rules about fine print should make it easier for buyers to shop, reducing search costs). This would be an important step but may not be a sufficient one because the concepts are difficult, the provisions are many, and consumers may rationally continue to remain ignorant. See Robert A. Hillman, *Online Boilerplate: Would Mandatory Website Disclosure of E-Standard Terms Backfire?*, 104 MICH. L. REV. 837, 839 (2006) (expressing concern about requiring mandatory disclosures and speculating that such disclosures may not incentivize consumers to read them while making it more likely that they would be enforced).

<sup>138</sup> See Michael I. Meyerson, *The Efficient Consumer Form Contract: Law and Economics Meets the Real World*, 24 GA. L. REV. 583, 600 (1990) (explaining that, because of the costs, it is "rational

consumers do not read contracts of adhesion. A consumer is better off clicking “I agree” and purchasing a song for one dollar than attempting to tackle the extensive contract that attends the purchase. This is the problem of rational ignorance. It applies to sophisticated consumers as well as unsophisticated ones, and it makes contracts of adhesion particularly likely to disadvantage consumers.<sup>139</sup> Indeed, empirical data shows that only one or two in every thousand consumers even glance at adhesive contracts in online transactions.<sup>140</sup>

The argument that consumers will account for the price of risk does not necessarily address these fears. Some believe that the fact that a provision was unknown to the consumer does not necessarily preclude it from being priced into the market; rather, the market prices in the risk the consumer assumes by agreeing to be bound by unknown terms.<sup>141</sup> But since consumers do not generally know the magnitude of the risk, nor the likelihood that certain unfavorable consequences will result, they are unlikely to price this risk accurately. Or, similarly, consumers may believe that they are facing less risk than they are in actuality. In that case, consumers would not be pricing uncertainty, but rather would be pricing a false sense of certainty. When consumers are ill-equipped to accurately price the risk they face, businesses can take advantage of this ignorance to drive hard bargains.

Additionally, courts and scholars have begun to recognize that contracts of adhesion impose costs on consumers who are not party to the contract by

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for even a conscientious consumer to pay little, if any, attention to subordinate contract terms”). Another way of describing the problem is through recognition of “bounded rationality”: consumers’ cognition is limited, often because of alternative priorities, such that they often fail to make the choices that economists would predict. See Jolls et al., *supra* note 130, at 1505-17 (explaining that bounded rationality and fairness concerns have “real predictive and explanatory power,” and describing scenarios in which consumers behave contrary to the way a wealth-maximizing consumer would behave); Korobkin, *supra* note 132, at 1292-93 (arguing that we can “describe an individual’s decision to sacrifice accuracy in order to minimize effort as a ‘rational’ choice” because of our cognitive limitations).

<sup>139</sup> For further discussion on the market inefficiencies of contracts of adhesion, see generally Gilo & Porat, *supra* note 31 (arguing that traditionally oppressive terms can be curbed by market competition, but terms that affect only a select number of consumers and terms that are obscured by complex contractual language distort the market and demand intervention).

<sup>140</sup> Yannis Bakos et al., *Does Anyone Read the Fine Print? Consumer Attention to Standard Form Contracts 2* (N.Y.U. L. & Econ. Working Papers, Paper No. 195, 2014); see also *id.* (“Such a small number of contract readers would seem to cast doubt on the existence of an informed minority of a size sufficient to police against one-sided terms, at least in the context of software sold online.”).

<sup>141</sup> See, e.g., Barnett, *supra* note 129, at 635-37 (arguing that when consumers agree to contracts they have not read or understood, they are assuming risk, something they do frequently in many other aspects of their lives). Barnett’s argument implies that consumers pay less as a result of assuming the risk in form contracts, because the expected value of the contract is lower when the consumer bears higher expected costs of litigation and lower likelihood of favorable dispute resolution. See, e.g., DEVLIN, *supra* note 131, at 37 (explaining that “[t]he expected value of a particular choice . . . is the average of the probability distribution of all potential returns”).



generating collective action or coordinated action problems.<sup>142</sup> This happens in two main ways. First, coordinated action problems exist in the right to sue as a member of a class. If others do not have the right to sue as a member of a class, no individual has an incentive to bargain (and thus pay more) for that right, since she would not be able to exercise it.

Second, coordinated action problems can arise in arbitration confidentiality agreements. Consumers do not have an incentive to bargain and pay more to eliminate confidentiality clauses in arbitration provisions, because an individual's silence does not cost her significantly. But her silence costs future consumers, who cannot evaluate the fairness of an arbitrator or the results of past arbitrations on similar issues when they cannot access the relevant data on that arbitrator's past awards. In contrast, businesses are generally repeat players and have their own sets of data about arbitrators from which to draw to ensure favorable rulings.<sup>143</sup> Thus a consumer acting in pursuit of her own welfare alone can disadvantage other consumers and give businesses the upper hand.

Within the law and economics tradition, these collective action problems justify intervention because individuals pursuing their own ends will not actually maximize societal welfare. A collective action problem exists when the option that individuals most prefer—call it Option A—is only valuable when others participate.<sup>144</sup> In the absence of others' participation, individuals are best served by making a different choice—call it Option B. In cases where individuals cannot be sure that others will choose Option A, they will choose Option B. Because all individuals choose the less-preferable Option B, the result for society is suboptimal. In the face of collective action problems, market forces pushing individuals to choose Option B are actually counterproductive. Such circumstances beg for coordinated intervention, either by the government or other actors.

### B. *A Rights-Based Normative Meaning*

Although most of the literature on unconscionability and contracts of adhesion emphasizes their economic advantages and disadvantages, it is worth

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<sup>142</sup> See *infra* notes 173–95 and accompanying text.

<sup>143</sup> See Susan Randall, *Judicial Attitudes Toward Arbitration and the Resurgence of Unconscionability*, 52 BUFF. L. REV. 185, 219 (2004) (“The drafter is likely a repeat participant in arbitrations, and so has advantages in arbitrator selection and case presentation.”).

<sup>144</sup> See Christopher R. Leslie, *The Significance of Silence: Collective Action Problems and Class Action Settlements*, 59 FLA. L. REV. 71, 74 (2007) (“Collective action problems exist whenever individual members of a group, by pursuing their own short-term self-interest, act in a manner that makes every member worse off in the long run.”).

noting that a moral or rights-based argument could be made against these contracts as well. For example, Seana Shiffrin argues that unconscionability is a way for the state to exercise its independent moral judgment to decline to enforce a contract.<sup>145</sup> Along similar lines, Nicolas Cornell argues that the normative meaning of the unconscionability doctrine is a kind of moral standing requirement, where a complainant loses the right to complain about a breach because of his or her own bad behavior.<sup>146</sup>

Another rights-based objection to contracts of adhesion considers contracts as promises.<sup>147</sup> Under this view, it is antithetical to a person's integrity to consider her to have promised to do or refrain from doing something of which she is unaware. These rights-based views may undergird many peoples' objections to contracts of adhesion.

Much more could be said about the rights-based views that support the doctrine of unconscionability. For now, I put them aside because the doctrine of unconscionability follows from that perspective more naturally than it does from a law and economics perspective. Because rights-based views rely less on subjective valuation, they have less difficulty justifying judicial interference in freely made bargains.<sup>148</sup> In fact, those views would likely justify a more expansive jural meaning of unconscionability than the one I offer. The explanatory work needed to connect those views with the jural meaning I offer would come from a very different angle: explaining not why unconscionability should reach the contracts that it does, but rather why it should not reach more contracts than it does under this jural meaning. That work is beyond the scope of this Comment.

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<sup>145</sup> Seana Valentine Shiffrin, *Paternalism, Unconscionability Doctrine, and Accommodation*, 29 PHIL. & PUB. AFF. 205, 223 (2000). Other scholars hint at this argument by emphasizing the extent to which unconscionability can protect the poor. See, e.g., Fleming, *supra* note 34, at 1400-02 (discussing the objections leveled by Friedrich Kessler that contracts of adhesion "threatened to empower a new 'feudal order' of 'powerful industrial and commercial overlords'" (citing Friedrich Kessler, *Contracts of Adhesion—Some Thoughts About Freedom of Contract*, 43 COLUM. L. REV. 629, 640 (1943))).

<sup>146</sup> Nicolas Cornell, *A Complaint Oriented Approach to Unconscionability*, 164 U. PA. L. REV. (forthcoming April 2016).

<sup>147</sup> See, e.g., CHARLES FRIED, *CONTRACT AS PROMISE: A THEORY OF CONTRACTUAL OBLIGATION* 16 (2d ed. 2015) ("An individual is morally bound to keep his promises because he has intentionally invoked a convention whose function is to give grounds—moral grounds—for another to expect the promised performance." (footnote omitted)); Cornell, *supra* note 146 ("[W]hatever the explanation for why voluntarily promising generates a moral obligation, that same explanation can potentially be used to describe why contracts create obligations.").

<sup>148</sup> Compare DEVLIN, *supra* note 131, at 51 ("[L]aw and economics focuses on . . . satisfying individual preferences."), with Shiffrin, *supra* note 145, at 228-29 (starting from the position that "[t]he institution of contract is a social creation through which we, the community, provide support to one another's agreements to facilitate them and to create greater security in them," and extrapolating that the community should "evaluate whether it will assist endeavors . . . that are significantly exploitative or immoral" (footnote omitted)).

Finally, this is not to say that unconscionability must be motivated by economic efficiency. Rather, unconscionability need not choose between normative meanings; just as tort law has both an economic and a rights-based normative meaning,<sup>149</sup> so too may unconscionability.

### III. UNCONSCIONABILITY AS A COHERENT CONCEPT

The new unconscionability doctrine takes into account the major law and economics critiques: consumers' inability to appropriately price the terms of contracts and collective action problems associated with certain types of provisions. The harm created by these contracts drives the normative meaning of unconscionability. The jural meaning has only very recently developed in the case law. As previously discussed, I argue it can be distilled down to the following: *when the offeror has reason to believe that a reasonable person in the offeree's position would not know the meaning of the terms in the contract, the offeror cannot impose on the offeree terms either that a reasonable person would not expect, or that, even if expected, would impose costs on third parties similarly situated to the offeree.*

By looking to the knowledge of the meaning of the terms in a contract, courts refuse to enforce contracts that would not be accurately priced on the market. And by refusing to recognize class action waivers and confidentiality provisions for arbitration clauses, courts account for collective action problems unreachable by unrestrained market forces.

"Know the meaning of the terms in the contract" refers to both 1) terms in "legalese" that a reasonable consumer would not understand if she read them; and 2) terms that a reasonable consumer would not read because it would not be economically rational to do so. Courts often speak of whether a contract was "understandable," and this Comment argues that this analysis can, and should, include an analysis of both these elements. This Comment will use "understandability" in this expansive sense: a contract that is too long is not understandable in today's world even if its terminology is simple.

The emphasis on consumer knowledge, understandability, and expectations as an integral part of the unconscionability analysis is new. For example, a Westlaw search of all state and federal cases before 1980 reveals just fifteen that mention unconscionability, understanding, and expectations.<sup>150</sup> These terms are commonplace today as part of an analysis of

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<sup>149</sup> See *supra* notes 23–27 and accompanying text.

<sup>150</sup> Search Results, WESTLAW NEXT, <http://next.westlaw.com> (search "advanced: (unconscionability, & understand, & expectation) & DA(bef 01-01-1980)") (last visited Nov. 21, 2015).

unconscionability: the same search of cases reveals that, between 2000 and 2014 alone, there were 526 cases.<sup>151</sup>

A. *Emphasis on Whether the Contract Was Understandable*

Courts increasingly look at whether the contract was understandable, rather than understood, as part of the procedural unconscionability analysis. By ensuring a contract is understandable, they ensure that at least *some* consumers are likely to actually understand it. Because the market can function effectively (such that exchanges will increase societal welfare) as long as there exist some number of knowledgeable consumers—indistinguishable to sellers from the ignorant consumers—to pressure the market, this emphasis reinforces the norm that free exchanges be value-increasing. Under this model, every individual need not understand the product she is buying or the contract she is signing for those products and contracts to be efficiently priced.

This standard is more likely to result in a consumer-friendly decision than the old doctrine based on reasonable expectations, which found that a contract is to be interpreted in accordance with the expectations of a misunderstanding party only where the other party is aware of the misunderstanding.<sup>152</sup> That standard required the more knowledgeable party to know that the other party did not understand the contract for expectations to come into play. The new standard of unconscionability requires merely that the knowledgeable party know that a reasonable consumer would not understand the contract (in the expansive sense of “understand”) in order to consider consumer expectations. It requires no understanding on the part of the particular consumer at issue, thereby accommodating mass-market Internet contracting.

Courts have long recognized that consumers do not always know or understand the contents of contracts. The Supreme Court in 1873 noted the typical consumer’s lack of knowledge or understanding of a contract’s contents. In analyzing the relationship between a carrier and his customers, the *Longwood* Court stated that the customer “prefers . . . to accept any bill of lading, or sign any paper the carrier presents; often, indeed, without

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<sup>151</sup> Search Results, WESTLAW NEXT, <http://next.westlaw.com> (search “advanced: (unconscionability, & understand, & expectation) & DA(aft 12-31-2000) & DA(bef 12-31-2014)”) (last visited Nov. 21, 2015).

<sup>152</sup> See RESTATEMENT (SECOND) OF CONTRACTS § 20(2)(a) (AM. LAW INST. 1981) (“The manifestation of the parties are operative in accordance with the meaning attached to them by one of the parties if that party does not know of any different meaning attached by the other, and the other knows the meaning attached by the first party.”).

knowing what the one or the other contains.”<sup>153</sup> The Court did not discuss evidence of the individual cattle drover’s understanding of the contract; rather, the Court considered consumers of the services of common carriers generally. Similarly, the new shape of the unconscionability doctrine recognizes the importance of the typical consumer.

Today, courts probe this element with increasing frequency. For example, the Florida Supreme Court, in holding an agreement unconscionable, noted first that the consumers lacked an understanding of the contract written by a car dealership,<sup>154</sup> and then moved to an objective analysis, explaining that “none of the dealership’s employees involved in the deal with the buyers could explain arbitration as an alternative dispute remedy in an understandable way.”<sup>155</sup> Many other courts also look to whether the contract was “understandable by an adult of ordinary experience and intelligence”—as the Kentucky Supreme Court recently put it<sup>156</sup>—considering factors such as the amount of time consumers were given to read the contract,<sup>157</sup> the complexity of the language,<sup>158</sup> and what opportunity the consumer had to read the contract.<sup>159</sup> These cases exemplify courts’ emphasis on the understandability of the contract as an objective matter.

This inquiry can establish certain procedural problems with contracts of adhesion; a further analysis guides courts in determining which of a contract’s substantive provisions should be unenforceable. In evaluating a contract’s substance, many courts apply the “reasonable expectations” test, which reflects the unconscionability doctrine’s sensitivity to the market’s ability to accurately price contract provisions by giving effect to the contract that the market most likely priced through consumer expectations, rather than to the actual signed contract.

For example, Montana honors a consumer’s “objectively reasonable expectations . . . even though painstaking study of the policy provisions would

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<sup>153</sup> *Railroad Co. v. Lockwood*, 84 U.S. (17 Wall.) 357, 379 (1873).

<sup>154</sup> *Basulto v. Hialeah Auto.*, 141 So.3d 1145, 1152 (Fla. 2014).

<sup>155</sup> *Id.*

<sup>156</sup> *Energy Home, Div. of S. Energy Homes, Inc. v. Peay*, 406 S.W.3d 828, 836 (Ky. 2013).

<sup>157</sup> *See Sosa v. Paulos*, 924 P.2d 357, 362 (Utah 1996) (“Factors bearing on procedural unconscionability included . . . whether each party had a reasonable opportunity to understand the terms and conditions of the agreement . . .” (citation omitted)).

<sup>158</sup> *See, e.g., Brewer v. Mo. Title Loans*, 364 S.W.3d 486, 493 (Mo. 2012) (acknowledging evidence that the contract in question “was difficult for the average consumer to understand”).

<sup>159</sup> *See, e.g., Razor v. Hyundai Motor Am.*, 854 N.E.2d 607, 622-23 (Ill. 2006) (finding unconscionability where challenged warranty was “unavailable to the consumer until after she took delivery”).

have negated those expectations.”<sup>160</sup> In Mississippi,<sup>161</sup> California,<sup>162</sup> Missouri,<sup>163</sup> and Washington,<sup>164</sup> courts look to the reasonable consumer’s expectations to evaluate the substantive unconscionability element. Other courts look at whether the provision was “commercially unreasonable”—a feature of many states’ unconscionability doctrines that requires a similar analysis.<sup>165</sup>

The reasonable expectations doctrine gives meaning to the substantive prong of unconscionability analysis. It has allowed courts to invalidate a wide variety of provisions, such as limitations on the availability of full recovery by the consumer (including practical limitations created by excessive fees or fee-shifting), selection of a seriously inconvenient forum, and unduly tight deadlines for filing claims.<sup>166</sup> By looking at what reasonable consumers would expect the contract to contain, courts acknowledge that the contract that consumers believe they agree to is sometimes not the one they get.

The importance of consumer expectations has older roots. The 1950 comment to U.C.C. section 2-302 defined an unconscionable clause as one “so one sided as not to be expected.”<sup>167</sup> The modern version of the section

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<sup>160</sup> Fisher *ex rel.* McCartney v. State Farm Mut. Auto. Ins. Co., 2013 MT 208, ¶ 19, 371 Mont. 147, 305 P.3d 861, 867 (citation omitted); *see also* Kelker v. Geneva-Roth Ventures, 2013 MT 62, ¶¶ 18-19, 369 Mont. 254, 303 P.3d 777 (noting that reasonable expectations analysis is part of a procedural unconscionability finding, but that a finding of substantive unconscionability alone can still be sufficient). For a discussion of this approach in interpretation of insurance contracts, *see generally* Robert Keeton, *Insurance Law Rights at Variance with Policy Provisions*, 83 HARV. L. REV. 961 (1970).

<sup>161</sup> *See, e.g.*, Caplin Enters. v. Arrington, 2011-CT-01932-SCT (¶ 13) (Miss. 2014) (“To determine whether a contract is substantively unconscionable, we look . . . to the specific terms which violate the expectations of, or cause gross disparity between, the contracting parties.” (citation omitted)).

<sup>162</sup> *See* Sonic-Calabasas A, Inc. v. Moreno, 311 P.3d 184, 202 (Cal. 2013) (noting that unconscionable terms are “provisions that seek to negate the reasonable expectations of the nondrafting party”).

<sup>163</sup> *See Brewer*, 364 S.W.3d at 495 (“It is unlikely that the ramifications of such provisions are comprehended by the average consumer or comport with the reasonable expectations of an average member of the public.”).

<sup>164</sup> *See Brown v. MHN Gov’t Servs.*, 306 P.3d 948, 954 (Wash. 2013) (“Procedural surprise generally relates to whether the challenged term is hidden in a standardized form or beyond the reasonable expectations of the weaker party.”).

<sup>165</sup> Lonegrass, *supra* note 10, at 16; *see also, e.g.*, Kinkel v. Cingular Wireless LLC, 857 N.E.2d 250, 267 (Ill. 2006) (“Substantive unconscionability concerns the question whether the terms themselves are ‘commercially reasonable.’” (citation omitted)); *Cordova v. World Fin. Corp. of N.M.*, 208 P.3d 901, 907 (N.M. 2009) (“The substantive analysis focuses on such issues as whether the contract terms are commercially reasonable and fair. . . .”); *Wis. Auto Title Loans, Inc. v. Jones*, 2006 WI 53, ¶ 36, 290 Wis. 2d 514, 714 N.W.2d 155 (“The analysis of substantive unconscionability requires looking at the contract terms and determining whether the terms are commercially reasonable.” (footnote omitted)).

<sup>166</sup> *See supra* notes 104–06 and accompanying text.

<sup>167</sup> *Leff, supra* note 11, at 498.

includes comments explaining that the doctrine seeks “the prevention of . . . unfair surprise.”<sup>168</sup>

The explanation for using market inefficiency as an indicator of unconscionability is a better analysis than claiming that unconscionability is entirely subjective. Some scholars argue that this subjective element is in fact the unconscionability doctrine’s core jural meaning.<sup>169</sup> And indeed, some courts continue to look not at understandability or reasonable expectations but at the individual parties’ understandings.<sup>170</sup> But this theory of unconscionability’s meaning would fail to explain the vast number of cases in which courts enforce contracts without considering whether the contracting consumer understood them, upon finding it was understandable.<sup>171</sup> A more comprehensive explanation is that the unconscionability doctrine holds procedurally unconscionable not contracts that were misunderstood or not understood at all, but rather contracts that were not understandable to a reasonable consumer and imposed unexpected conditions. By doing so, unconscionability counteracts market inefficiencies.

#### B. *Preventing Collective Action Problems*

In a growing number of states, the unconscionability doctrine has been used to hold unenforceable contract provisions that present collective action problems. At least two types of clauses in contracts of adhesion present these

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<sup>168</sup> U.C.C. § 2-302 cmt. 1 (AM. LAW INST. & NAT’L CONFERENCE OF COMM’RS ON UNIF. STATE LAWS 2014) (citation omitted).

<sup>169</sup> See, e.g., Barnes, *supra* note 1, at 184 (“By proper alignment of adhesion and unconscionability, we can avoid over breadth in our characterization of assent and bargaining as objective in nature.”).

<sup>170</sup> See, e.g., Gladden v. Boykin, 739 S.E.2d 882, 884-85 (S.C. 2013) (holding a limited liability clause in home inspection contract enforceable, and noting that “a self-employed home inspector operating out of his home had no significantly greater bargaining power or cognizably more sophistication than a trained though not practicing real estate agent, and there is no allegation that [the plaintiff] lacks the education to understand the terms of a contract or protect her own interests”).

<sup>171</sup> See, e.g., Energy Home, Div. of S. Energy Homes, Inc. v. Peay, 406 S.W.3d 828, 836 (Ky. 2013) (finding provision in manufactured home purchase contract was not procedurally unconscionable because “the arbitration requirements are stated in clear and concise language; it is not hidden or obscured” and “the agreement clearly explains” arbitration); Fisher *ex rel.* McCartney v. State Farm Mut. Auto. Ins. Co., 2013 MT 208, ¶ 23, 371 Mont. 147, 305 P.3d 861 (enforcing family-member exclusion in auto insurance contract because “[a] person of average intelligence would be able to determine” that the policy had these exclusions “by a review of these provisions of the Policy”); Rodriguez v. Raymours Furniture Co., 93 A.3d 760, 763-64 (N.J. Super. Ct. App. Div. 2014) (holding enforceable a six-month statute of limitations in an employment form contract even though the Spanish-speaking employee did not understand it in part because “the provision was clear in its terms, [and] was conspicuously placed in the application form”).

problems: confidentiality requirements respecting the outcome of arbitration and class action waivers.

### 1. Confidentiality Requirements

Confidentiality requirements respecting arbitration outcomes create collective action problems because individuals are only marginally affected and thus have relatively little incentive to bargain with a business to eliminate them; after all, that consumer will know the result of her arbitration, notwithstanding the confidentiality clause. However, in aggregate, such clauses deprive consumers of the ability to evaluate whether arbitrators are deciding cases fairly or consistently. Therefore, a system in which every individual pays a few cents more for a contract that does not contain a confidential arbitration provision and affords consumers the ability to evaluate arbitrators is likely optimal (“Option A”). On the contrary, the current situation, favoring freedom of contract, shepherds consumers into choosing a slightly cheaper contract that keeps the results confidential (“Option B”) because they cannot be assured others will choose to eliminate such clauses, and so will reap no reward from putting the cost and effort into eliminating such clauses from their own contracts. Thus, an exclusive focus on the rights of the parties before the court, without regard to the way the contract provisions affect social welfare as a whole, is detrimental.

Although some courts refuse to look beyond the parties, taking seriously their traditional common law role of resolving discrete disputes rather than determining the best social practices,<sup>172</sup> many other courts are beginning to invalidate confidentiality provisions in contracts of adhesion, acknowledging the impact those provisions have on both the parties and nonparties to the contract. For example, the Supreme Court of Kentucky held unenforceable a term in a contract of adhesion requiring confidentiality respecting the outcome of the mandatory arbitration.<sup>173</sup> The court recognized that secrecy would prevent adequate evaluation of the fairness of the arbitrator and would preclude the gathering of necessary evidence for building a case of misconduct.<sup>174</sup> As the plaintiff argued, “as a repeat participant in the arbitration proceedings, the company is able to gather a body of information

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<sup>172</sup> See, e.g., Parilla v. IAP Worldwide Servs. VI, Inc., 368 F.3d 269, 280 (3d Cir. 2004) (“Each side has the same rights and restraints under those provisions and there is nothing inherent in confidentiality itself that favors or burdens one party *vis-a-vis* the other in the dispute resolution process. Importantly, the confidentiality of the proceedings will not impede or burden in any way [plaintiff’s] ability to obtain any relief to which she may be entitled.”).

<sup>173</sup> Schnuerle v. Insight Commc’ns Co., 376 S.W.3d 561, 579 (Ky. 2012).

<sup>174</sup> *Id.* at 578-79.



relating to precedent and rulings arising from within the dispute resolution process, to which customers involved in separate proceedings would have no access.”<sup>175</sup> Other jurisdictions have similarly recognized that confidentiality agreements, though applied to both parties equally, advantage the repeat player.<sup>176</sup> Courts thus often expressly look to the impact such provisions have on the arbitration system.

## 2. Class Action Waivers

The second collective action problem created by contracts of adhesion involves class action waivers. These present a collective action problem because an individual consumer obtains no value out of the right to participate in a class action suit unless other consumers also have that right. Therefore, a consumer will not pay a higher price for a contract that allows such suits if she does not have reason to believe that other consumers are doing the same. In other words, consumers must insist on the absence of such waivers as a group for the absence of the waivers to be valuable.

In many states, the unconscionability doctrine invalidates class action waivers.<sup>177</sup> But states’ movement in this direction was upset in 2011 when the

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<sup>175</sup> *Id.* at 578.

<sup>176</sup> *See, e.g.,* *Ting v. AT&T*, 319 F.3d 1126, 1152 (9th Cir. 2003) (finding confidentiality agreement unconscionable because it gave repeat players advantages that could not be mitigated); *Sprague v. Household Int’l*, 473 F. Supp. 2d 966, 975 (W.D. Mo. 2005) (holding confidentiality agreement unconscionable because it benefited the repeat player defendant); *Torrance v. Aames Funding Corp.*, 242 F. Supp. 2d 862, 875 (D. Or. 2002) (holding a confidentiality provision unconscionable and expressing concern over such provisions); *Luna v. Household Fin. Corp.* III, 236 F. Supp. 2d 1166, 1180 (W.D. Wash. 2002) (“The advantages repeat participants possess over ‘one time’ participants in arbitration proceedings are widely recognized in legal literature and by federal courts.”); *Acorn v. Household Int’l, Inc.*, 211 F. Supp. 2d 1160, 1172 (N.D. Cal. 2002) (“By keeping all awards confidential, any advantages that inure to Defendants as repeat participants are effectively concealed, thereby preventing the scrutiny critical to mitigating those advantages . . . . [I]f consumers obtain determinations that a particular . . . practice is unlawful, they are prohibited from alerting other consumers.”); *Zuver v. Airtouch Commc’ns, Inc.*, 103 P.3d 753, 764 (Wash. 2004) (“[R]epeat arbitration participants enjoy advantages over one-time participants and . . . confidentiality provision[s] magnif[y] the effect of those advantages.”). *But see* *Kilgore v. KeyBank, Nat’l Ass’n*, 718 F.3d 1052, 1058-59 (9th Cir. 2013) (declining to find the confidentiality provision in an arbitration clause unconscionable because of a lack of procedural unconscionability); *Iberia Credit Bureau, Inc. v. Cingular Wireless LLC*, 379 F.3d 159, 175 (5th Cir. 2004) (“While the confidentiality requirement is probably more favorable to the cellular provider than to its customer, the plaintiffs have not persuaded us that the requirement is so offensive as to be invalid.”).

<sup>177</sup> *See, e.g.,* *Ingle v. Circuit City Stores*, 328 F.3d 1165, 1176 (9th Cir. 2003) (“Circuit City, through its bar on class-wide arbitration, seeks to insulate itself from class proceedings while conferring no corresponding benefit to its employees in return. This one-sided provision . . . operates solely to the advantage of Circuit City.”); *Szetela v. Discover Bank*, 118 Cal. Rptr. 2d 862, 868 (Ct. App. 2002) (“The clause is not only harsh and unfair to Discover customers who might be owed a relatively small sum of money, but it also serves as a disincentive for Discover

Supreme Court in *AT&T Mobility LLC v. Concepcion* held that an arbitration agreement that did not provide for class-wide arbitration was enforceable, overturning the California Supreme Court's holding that the effective waiver of the plaintiff's right to a class action was unconscionable.<sup>178</sup> The Court explained that the rule the California court applied was preempted by the Federal Arbitration Act, noting that California courts had "frequently applied this rule to find arbitration agreements unconscionable."<sup>179</sup> It is unclear whether *Concepcion* bars states from finding that class action waivers are unconscionable, particularly in light of Justice Thomas's concurrence, providing the majority with its fifth vote. Justice Thomas argued that common law defenses to contracts that "relate[] to the making of an agreement" would not violate the Federal Arbitration Act (FAA).<sup>180</sup> His language convinced at least some state courts that unconscionability was still a viable defense against class action waivers, as long as that defense was not used "in a way that would hold otherwise valid arbitration agreements unenforceable for the sole reason that they bar class relief."<sup>181</sup>

The Missouri Supreme Court explained in *Brewer v. Missouri Title Loans* that "[n]ot all state law contract defenses require class wide arbitration to the detriment of both the defendant and the plaintiff consumer."<sup>182</sup> Rather, some contracts might provide arbitration terms that are more favorable than class arbitration.<sup>183</sup> Explaining that California's rule in *Concepcion* disfavored arbitration by analyzing unconscionability as though it were an arm of the state's public policy and not an independent common law concept, the court contrasted *Concepcion's* interpretation of California's rule with the Missouri doctrine of unconscionability.<sup>184</sup> The court, in a nod to Justice Thomas's concurrence, explained that "unconscionability is linked inextricably with the process of contract formation because it is at formation that a party is required

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to avoid the type of conduct that might lead to class action litigation in the first place."); *Kinkel v. Cingular Wireless, LLC*, 828 N.E.2d 812, 821 (Ill. App. Ct. 2005) (holding class action waiver was unconscionable because it could limit access to court and was one-sided in its application); *Fiser v. Dell Comput. Corp.*, 188 P.3d 1215, 1221 (N.M. 2008) (concluding that class action waiver is contrary to public policy); *State ex rel. Dunlap v. Berger*, 567 S.E.2d 265, 278-79 (W. Va. 2002) (finding a class action waiver unconscionable because it allowed wrongdoers "to go unpunished, undeterred, and unaccountable"); see also J. Maria Glover, *Beyond Unconscionability: Class Action Waivers and Mandatory Arbitration Agreements*, 59 VAND. L. REV. 1735, 1752-53 n.87 (2006) (listing additional cases that have invalidated class action waivers).

<sup>178</sup> 131 S. Ct. 1740, 1753 (2011).

<sup>179</sup> *Id.* at 1746 (citation omitted).

<sup>180</sup> *Id.* at 1755 (Thomas, J., concurring).

<sup>181</sup> *Brewer v. Mo. Title Loans*, 364 S.W.3d 486, 489 (Mo. 2012).

<sup>182</sup> *Id.* at 490.

<sup>183</sup> *Id.* at 489.

<sup>184</sup> *Id.* at 491.

to agree to the objectively unreasonable terms.”<sup>185</sup> The court went on to apply the unconscionability doctrine to invalidate the provision in a contract that precluded class action litigation because the contract was adhesive, and because the inability to pursue the action as a class effectively barred the plaintiff from bringing his claim entirely.<sup>186</sup>

As if to bolster the Missouri Supreme Court’s statement that it was not invalidating contract provisions on the mere existence of a class action waiver, the court issued another opinion on the same day as *Brewer*, reversing a lower court decision finding a class action waiver unenforceable per se on the grounds of unconscionability and remanding the case for consideration of the enforceability of the agreement based on “ordinary state-law principles that govern contracts,” in light of *Concepcion*.<sup>187</sup> The highest court in Massachusetts similarly applied the unconscionability doctrine, in spite of the holding in *Concepcion*.<sup>188</sup>

The number of cases considering *Concepcion* are isolated, however, because the Supreme Court quickly returned to the subject when it further extended the reach of *Concepcion* in *American Express Co. v. Italian Colors Restaurant*.<sup>189</sup> In that case, the court held that an arbitration clause is still enforceable under the FAA even if the loss of the right to participate in a class action would practically preclude a plaintiff from bringing a suit—the reason used in both *Brewer* and *Feeney*.<sup>190</sup> In light of *American Express*, Massachusetts has retreated from its pro-class action holding in *Feeney*.<sup>191</sup> It is still unclear how the Missouri Supreme Court will respond to *American Express* with respect to class action waivers in arbitration agreements. It is possible that the Missouri courts could continue to apply the unconscionability doctrine to invalidate class action waivers found in adhesive contracts by emphasizing procedural, rather than substantive, unconscionability.<sup>192</sup> However, such arguments would be difficult to reconcile with the line drawn by *American*

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<sup>185</sup> *Id.* at 493.

<sup>186</sup> *Id.* at 493-96.

<sup>187</sup> *Robinson v. Title Lenders, Inc.*, 364 S.W.3d 505, 517-18 (Mo. 2012).

<sup>188</sup> *See Feeney v. Dell Inc.*, 989 N.E.2d 439, 441 (Mass. 2013) (finding a class action waiver may be unconscionable, despite *Concepcion*, by making claims effectively nonremediable), *abrogated by* *Am. Express v. Italian Colors Rest.*, 133 S. Ct. 2304 (2013).

<sup>189</sup> 133 S. Ct. 2304 (2013).

<sup>190</sup> *See id.* at 2311 (“[T]he fact that it is not worth the expense involved in *proving* a statutory remedy does not constitute the elimination of the *right to pursue* that remedy.”).

<sup>191</sup> *See Machado v. System4 LLC*, 993 N.E.2d 332, 333 (Mass/ 2013) (acknowledging that *American Express* abrogated *Feeney*).

<sup>192</sup> *See, e.g., Lopez v. H & R Block, Inc.*, 429 S.W.3d 497, 503 (Mo. Ct. App. 2014) (holding that the trial court erred in finding the class action waiver unconscionable as against public policy, but remanding for further factfinding on possible procedural problems with respect to the contract).

*Express*. Other states' courts have expressed sympathy for the *Feeney* and *Brewer* holdings, but have held that the ruling in *Concepcion* precludes the use of the unconscionability doctrine in this way.<sup>193</sup>

In light of *Concepcion* and *American Express*, arguments that class action waivers that come as part of arbitration clauses are unenforceable because they are inefficient are relegated to the realm of policy for the legislature, rather than doctrine for the courts. To reinstate the law as it was before *Concepcion*, under which state courts are free to invalidate arbitration provisions barring class action suits using the unconscionability doctrine, Congress would have to amend the FAA. Doctrinally, though, unconscionability may still mean that certain economic inefficiencies in contracts of adhesion are unenforceable; the FAA preempts only provisions that relate to limitations on class actions in arbitration provisions.

The Supreme Court's pro-arbitration jurisprudence is likely a major factor contributing to the coalescence of unconscionability as its own doctrine and differentiating it from public policy. By the 1980s, the Court openly espoused the benefits of arbitration and interpreted disputes in favor of the policy.<sup>194</sup> This strengthened the argument that federal law preempted state courts from invalidating arbitration provisions on the grounds of public policy.<sup>195</sup> But the

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<sup>193</sup> See, e.g., *McKenzie Check Advance of Fla. v. Betts*, 112 So.3d 1176, 1181-83, 1188 (Fla. 2013) (extensively analyzing California unconscionability law and holding *Concepcion* requires the court to enforce a class action waiver, and cannot hold it void under public policy). The Kentucky Supreme Court has perhaps more than any other state court expressed its disagreement with *Concepcion*, but has also acknowledged that its hands are tied:

Because of the important purpose served by class actions, we would be inclined to join the jurisdictions . . . that have invalidated provisions of consumer adhesion contracts that bar class action resolution of disputes. Our initial opinion in this case so held. However, upon application of *Concepcion*, we are now constrained to conclude that under contracts like the one now before us, which contain a class action waiver and also require disputes to be arbitrated under the FAA, the federal policy favoring arbitration preempts any state law or policy invalidating the class action waiver as unconscionable based solely upon the grounds that the dispute involves many *de minimis* claims which are, individually, unlikely to be litigated.

*Schnuerle v. Insight Commc'ns Co.*, 376 S.W.3d 561, 569 (Ky. 2012).

<sup>194</sup> See Stempel, *supra* note 32, at 773-75 (showing how, beginning in the 1960s and 1970s, the Court began resolving uncertainties in arbitration clauses in a manner that was favorable to arbitration while simultaneously highlighting the social benefits of arbitration); see also, e.g., *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 19-29 (1983) (discussing the strong federal policy favoring arbitration when the scope of an agreement was ambiguous).

<sup>195</sup> See Jeffrey W. Stempel, *Pitfalls of Public Policy: The Case of Arbitration Agreements*, 22 ST. MARY'S L.J. 259, 339 (1990) ("Judicial doctrines or methods that fail to give full and fair effect to the Arbitration Act on the basis of unconvincing 'implicit' readings of a statute, notions of the 'better' outcome, or relative preferences for litigation over arbitration are undesirable and ultimately indefensible on jurisprudential if not practical grounds.").

FAA allowed traditional contract defenses to void arbitration provisions.<sup>196</sup> Because it was less constrained than doctrines like duress or fraud, unconscionability was one of the only tools available to courts interested in limiting the enforceability of arbitration provisions in contracts of adhesion.<sup>197</sup> Thus courts saw even more reason to shape unconscionability into a traditional contract doctrine. Indeed, many state courts continue to manifest their resistance to mandatory arbitration agreements, though they do so covertly, often using facially neutral doctrines like unconscionability.<sup>198</sup> For example, in *Sonic-Calabasas A, Inc. v. Moreno*, upon reconsideration in light of *Concepcion* and *American Express*, the court left California's unconscionability rule unchanged.<sup>199</sup>

Recognizing the danger of harming third parties through contracts of adhesion is integrally connected to the mass use of the contracts. While in an individually negotiated contract it would be possible for individuals to barter away their rights to disclose the results of arbitration, or to waive the right to participate in a class action, these tradeoffs take on particular significance when they occur in mass-produced contracts of adhesion.

Accounting for these two components—a reasonable person's lack of knowledge of the terms or an effect on third parties—unconscionability fulfills a main element necessary to be a legal concept: it serves as a rational normative basis for a decision. The normative meaning of unconscionability is that procedural features and substantive contents that are inefficient from a market perspective are unenforceable. This meaning applies an economic analysis to determine whether the contract is one that would likely be priced accurately on the market, and therefore create value-enhancing exchanges, or whether it is one that creates collective action problems or otherwise precludes a maximally efficient outcome.

This examination of recent case law presents a possible jural description of unconscionability that pairs with its normative meaning. It shows that unconscionability means that when the offeror has reason to believe that a reasonable person in the shoes of the offeree would not know the meaning of the terms in the contract, the offeror cannot impose on the offeree terms

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<sup>196</sup> See *supra* notes 181–83 and accompanying text.

<sup>197</sup> See Stempel, *supra* note 32, at 792 (“Against this backdrop [of the Supreme Court’s jurisprudence], it is perhaps unsurprising that lower courts have to a degree rediscovered unconscionability analysis as one of the relatively few grounds remaining available for the policing of arbitration agreements.”).

<sup>198</sup> See Broome, *supra* note 36, at 44 (studying California Courts of Appeal and concluding that “unconscionability challenges succeed more frequently when the contractual provision at issue is an arbitration agreement”); Knapp, *supra* note 36, at 622–23 (finding that unconscionability claims were increasingly successful nationally between 1990 and 2008).

<sup>199</sup> 311 P.3d 184, 205–11 (Cal. 2013).

either that a reasonable person would not expect, or that, even if expected, would impose costs on third parties similarly situated to the offeree.

### C. *The Incipience of the Concept*

The explanation put forth here for unconscionability is in part descriptive and in part prescriptive. It is descriptive in the way it draws on current trends, but it is prescriptive in that it does not represent current trends perfectly; rather, it seeks to shape the common law to become more coherent with respect to this concept.

The description above of the concept of unconscionability could be said to be underexplanatory in that it fails to describe many of the ways in which courts use the concept of unconscionability. For example, courts continue to apply the unconscionability doctrine to refuse to enforce extremely high interest rates, even when consumers are well aware of them when signing.<sup>200</sup> These cases do not fit within the jural meaning offered here; these terms are often understandable—the exorbitant interest rate may be clearly written, right on the front page, and discussed with the consumer—and they do not inflict harms on third parties. Intervention is not necessary under an efficiency-based market-analysis, because these contracts could be priced appropriately by the market on its own, given that consumers know the terms they are agreeing to.

Although to some these kinds of cases are the hallmark of unconscionability analysis because they enable the unconscionability doctrine to be the “law of the poor,”<sup>201</sup> they are too different from the problems that Llewellyn revived unconscionability in order to address—contracts of adhesion. They are better handled by public policy, the old catch-all notion that allows a court to step in until the legislature intervenes. And, to varying degrees, legislatures have taken on the regulation of high interest rates.<sup>202</sup>

And indeed, there is likely no way to describe unconscionability as a concept in a way that embraces all those decisions in which it is currently used, and only those. To do this would be to allow the concept to dissolve into a collection of factual scenarios without classification. To classify is, inevitably, to cut off. It requires drawing a line and excluding certain features

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<sup>200</sup> See, e.g., *Kelker v. Geneva-Roth Ventures*, 2013 MT 62, ¶¶ 4, 37-38, 369 Mont. 254, 303 P.3d 777 (holding unconscionable a loan with an interest rate of 780%); *State ex rel. King v. B & B Inv. Grp., Inc.*, 2014-NMSC-024, ¶¶ 45, 329 P.3d 658 (N.M. 2014) (holding unconscionable a loan with an interest rate of over 1000%).

<sup>201</sup> See generally Fleming, *supra* note 34.

<sup>202</sup> Every state legislature has set maximum interest rates, typically between six and ten percent. Elizabeth R. Schiltz, *The Amazing, Elastic, Ever-Expanding Exportation Doctrine and Its Effect on Predatory Lending Regulation*, 88 MINN. L. REV. 518, 526 (2004). But these laws also have exceptions depending on the type of lender or the form of the loan. *Id.* at 527-28.

that connect in some ways, but not the “right” ways, with the other members of the class.<sup>203</sup> The hope is merely to describe a workable meaning of the concept that conforms in many ways with its current use, but also provides a rational basis for encircling and judging similarly. It does fail to match perfectly with current use; however, it succeeds in describing enough of its use to consider it a description of the concept’s core.

The definition of the concept as oriented toward market-efficiency could also be said to be overinclusive, in that it would require courts to invalidate provisions they currently uphold. For example, David Gilo and Ariel Porat argue that courts focus too much on traditional oppressive techniques, such as hiding provisions in adhesive contracts, but too little on selectively oppressive terms, selectively beneficial terms, or especially complex contracts.<sup>204</sup> These types of contracts, they argue, involve market inefficiencies because they differentiate between knowledgeable consumers and others, or because they increase the information gap between consumers and businesses.<sup>205</sup> Although thus far courts have not focused on the danger these types of provisions pose, courts could address them using the jural meaning of unconscionability offered here: consumers could be found to not understand the terms of especially complex contracts, and terms that selectively benefit or harm specific groups could be shown to harm third parties by obscuring the cost of the contract. However, courts do not appear to have applied the doctrine to these types of provisions.<sup>206</sup>

In addition to empirical results that fail to fit perfectly within the bounds of the doctrine offered here, courts do not always define the concept of unconscionability as this Comment does. Some states still reference and apply the traditional meaning of the concept as being one that “shocks the conscience.”<sup>207</sup> For example, although one New Jersey court applied a relatively modern version of the unconscionability doctrine, it still used language referring to the doctrine’s origins: “A party raising a claim of unconscionability has the burden of showing some over-reaching or imposition resulting from a bargaining disparity between the parties, or such patent unfairness in the terms of the contract that no reasonable [person] not acting under compulsion or out

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<sup>203</sup> See Schauer, *supra* note 21, at 535-38 (explaining that an essential attribute of rules is that they generalize, and therefore must sometimes treat members of the class inappropriately if the rules are to be independent of the reasons for action in any particular case).

<sup>204</sup> See generally Gilo & Porat, *supra* note 31, at 143-61.

<sup>205</sup> See *id.* at 194 (“Ironically, courts’ attention is much more needed with respect to the other three techniques, which courts currently ignore, because these techniques are expected to survive even fierce competition among suppliers.”).

<sup>206</sup> See *id.*

<sup>207</sup> See *supra* note 9 and accompanying text.

of necessity would accept them.”<sup>208</sup> But other courts hesitantly recognize a change and are reluctant to apply the “shocks the conscience” standard.<sup>209</sup> Still, other courts mention the old standard, but go on to discuss and apply more contemporary doctrinal elements as well.<sup>210</sup> The concept’s jural meaning is incipient and will likely take time to become explicit in courts’ language.

As an analysis of case law shows, objections of fit are also accurate from a linguistic perspective. And, as Gilo and Porat’s work shows, both the underexplanatory and overinclusive objections are accurate as an empirical matter. There are many instances that do not fit the mold. Thus, this Comment is not just an effort to describe what is occurring, but an effort to identify a core meaning in the cases. It is certainly true that courts would need to do more to adhere to the unconscionability doctrine in a consistent way.

#### D. *The Concept’s Jural Meaning and Formalist Concerns*

Legal scholars acknowledges the availability of unconscionability to address the problems associated with contracts of adhesion, but there is little agreement or understanding about how to effectively employ it. Unlike many common law concepts that generate broad agreement on their jural meaning but have disagreement on the norms that drive them,<sup>211</sup> unconscionability has done the opposite: while many agree on the norms deriving from the law and economics literature, they disagree on the corresponding jural meaning. In other words, scholars and courts disagree on when and how to apply the doctrine in a coherent way.

Although the jural meaning discussed here is not a formalist one, the division between normative and jural meaning is not entirely inconsistent with formalist views.<sup>212</sup> Ernest Weinrib argues that for a formalist concept, the “doctrinal and institutional elements can . . . be understood as the

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<sup>208</sup> *Rodriguez v. Raymours Furniture Co.*, 93 A.3d 760, 766 (N.J. Super. Ct. App. Div. 2014) (citation omitted).

<sup>209</sup> *See, e.g., State ex rel. King v. B & B Inv. Grp., Inc.*, 2014-NMSC-024, ¶ 32, 329 P.3d 658 (N.M. 2014) (stating that the test for substantive unconscionability asks whether the contract term “is grossly unreasonable and against our public policy under the circumstances” (citation omitted)).

<sup>210</sup> *See, e.g., Taylor v. Butler*, 142 S.W.3d 277, 285-86 (Tenn. 2004) (mentioning that unconscionability is found where terms “shock the judgment of a person with common sense” and going on to state “that enforceability of contracts of adhesion generally depends upon whether the terms of the contract are beyond the reasonable expectations of an ordinary person”).

<sup>211</sup> *See Balganesch & Parchmovsky, supra* note 23, at 1248 (explaining that an essential feature of the common law is the flexibility created by the possibility that a concept with a single jural meaning might have multiple normative meanings motivating it).

<sup>212</sup> *See Ernest J. Weinrib, Legal Formalism: On the Immanent Rationality of the Law*, 97 YALE L.J. 949, 968 (1988) (“If an initially identified feature is to serve as a fixed point of legal understanding, it must participate in the unity that renders a legal relationship intelligible as what it is.”).



articulations of a coherent justificatory structure of bipolar interaction.”<sup>213</sup> The structure must “render[] intelligible the relationships to which it applies.”<sup>214</sup> For example, loss spreading is not a doctrine in the formalist sense, because “the appropriate institutional setting for loss spreading is not the bipolarity of litigation, but a general scheme of social insurance or taxation that would spread accidental loss as thinly and broadly as possible.”<sup>215</sup> Loss spreading is not coherent because it cannot be fully applied through adjudication. It is therefore contrary to the integrity of law.<sup>216</sup> Thus, under the formalist understanding, loss spreading is not a legal concept; rather, the duty of care is the legal concept.

The Formalist would object that the problems with contracts of adhesion are not conducive to common law resolution because they are not resolved by looking to the rights and obligations of parties to a particular contract in an individual dispute, but rather demand consideration of third party needs. Because the jural meaning offered here requires courts to look to the possibility that third parties’ rights might be harmed by the contract before the court, Formalists (and others) might argue that the most appropriate institutional setting to address the problem of market-inefficient contracts is not the “bipolarity of litigation,” but rather the legislature.<sup>217</sup>

Ronald Dworkin presents a similar, though more moderate, argument distinguishing policy- and principle-based reasoning. While arguments based on policy “justify a political decision by showing that the decision advances or protects some collective goal of the community as a whole,” arguments based on principle “justify a political decision by showing that the decision respects or secures some individual or group right.”<sup>218</sup> He argues that judges should rely on principle rather than policy because doing so respects the democratic process by constraining unelected judges. He also believes that doing so avoids applying a right retroactively, thereby punishing someone for failing to perform an obligation of which he was unaware.<sup>219</sup> Dworkin’s argument is more expansive than Weinrib’s—for example, Dworkin accounts for

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<sup>213</sup> *Id.* at 969.

<sup>214</sup> *Id.*

<sup>215</sup> *Id.* at 971.

<sup>216</sup> *Id.*; see also RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 83-84 (1977) (calling a court’s reasoning in tort based on “a right to recovery” a “matter of principle,” and based on “whether it would be economically wise to distribute liability for accidents in the way the plaintiff suggested . . . a matter of policy”).

<sup>217</sup> Cf. Arthur Allen Leff, *Unconscionability and the Crowd—Consumers and the Common Law Tradition*, 31 U. PITT. L. REV. 349, 353-57 (1970) (pointing out the expense, time, and protracted litigation involved in the judicial approach to consumer protection in form contracts inherent in the common law tradition of adapting law case-by-case, and advocating for a legislative solution).

<sup>218</sup> DWORKIN, *supra* note 216, at 82.

<sup>219</sup> *Id.* at 84-86.

public, as well as private, law, and thus acknowledges that statutory rights may provide reasons in an appropriate legal sense, in addition to the common law.

The view offered here can be compatible with Formalism. While the advantages and disadvantages of contracts of adhesion cannot be seen within the context of individual disputes that have already come to the point of litigation,<sup>220</sup> the jural meaning here narrows the focus to the parties before the court while addressing normative concerns that reach society as a whole. Once unconscionability becomes conceptual, and therefore rule-based rather than entirely normative, judicial decisions are based on the principle derived from the jural meaning.<sup>221</sup> This is entirely consistent with the analytic and normative meanings in many other legal concepts, such as the duty of care in tort law. There, too, the loss spreading norm would not be conducive to common law adjudication, but the jural meaning of duty of care more closely conforms to the formalist definitions of a concept.<sup>222</sup>

Offering a jural meaning of a concept orients the judge toward principled reasons rather than policy reasons. The jural meaning provides the rule-like basis for a judge's decision. By differentiating it from the normative meaning, the jural meaning offers an approach to the common law that assuages some of the Formalists' fears about incoherence, unpredictability, and retroactivity.

Disagreement over the jural meaning of unconscionability is especially pronounced because unconscionability challenges some of the foundational ideas in contract law. As Jeremy Waldron argues, concepts in common law are important not just because they allow consistent application of rules, but also because they allow the interconnectedness of the law to become apparent.<sup>223</sup> Legal rules are not simply about providing answers to an "if *x* then *y*" question, but rather represent "a whole array of pairs of such propositions, addressing normative issues of slightly different shape and character."<sup>224</sup> Waldron argues that rules, and the concepts they use, are not just "single-issue signposts,"<sup>225</sup> but

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<sup>220</sup> See Baird, *supra* note 132, at 934 ("Legal academics too often exaggerate the dangers of boilerplate. They become completely caught up in a framework in which everything reduces to the rights of *A* against *B*, a framework that is out of touch with how mass markets work." (footnote omitted)).

<sup>221</sup> See, e.g., DWORKIN, *supra* note 216, at 83 (explaining that a law giving a subsidy creates a "right to a subsidy [that] no longer depends on any argument of policy because the statute made it a matter of principle").

<sup>222</sup> See Balganesch & Parchomovsky, *supra* note 23, at 1245 (arguing that the duty of care is structured as a legal standard, as opposed to a rule, and that some contend the duty is a means to impose liability on the cheapest cost avoider).

<sup>223</sup> Waldron, *supra* note 28, at 24-26. We need not get into a debate over positivism, as Waldron does, to see the importance of systematicity. Indeed, as Waldron himself agrees, systematicity can reenter even the Positivist's picture of law if we view it as normatively desirable, and therefore persuasive to the sovereign. *Id.* at 39-40.

<sup>224</sup> *Id.* at 24.

<sup>225</sup> *Id.*

rather are “interlocking parts of different shape, each contributing a particular functional component to an overall integrated picture.”<sup>226</sup> For example, to use the term “legal person” in one area of law—say, corporate law—has implications for other areas of the law in which personhood is recognized, such as international law.<sup>227</sup> The advantage of systematicity is that it allows lawmakers—judges and legislatures alike—to see how a new law will affect other laws that are already in place.<sup>228</sup>

By understanding unconscionability as a coherent concept, we can more readily understand—and cabin—the ways it interacts with other fundamental concepts in contract law. The two most important concepts in contract law with which unconscionability interacts are objective manifestation of assent (“OMA”) and the parol evidence rule (“PER”).

Unconscionability may cause one to question the age-old doctrine that agreement in contract law is established by objective manifestation assent—in other words, no subjective agreement is required, and courts will not look into the subjective intent of the parties, so long as the act that constituted acceptance was undertaken intentionally.<sup>229</sup> For example, it is fundamental to OMA that one can be bound by one’s assent whether or not one considers the legal consequences of one’s actions.<sup>230</sup> OMA greatly increases efficiency by relieving parties of the burden of proving the other party’s state of mind in routine agreements.<sup>231</sup>

The jural meaning presented in this Comment connects with, but does not upend, the traditional conception of OMA. The concept of unconscionability depends on consideration of whether the offeror has reason to believe that a *reasonable person* in the shoes of the offeree would not understand the contract. A finding that procedural unconscionability exists means that the consumer’s assent is less robust than in a traditional contract—what I will call “weak OMA.” By relying on the reasonable person standard, and using an expansive view of what it means to understand, unconscionability continues in the tradition of OMA, while still allowing protections for the consumer in an adhesive contract. This jural understanding of unconscionability avoids the threat of caving to a subjective

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<sup>226</sup> *Id.* at 25.

<sup>227</sup> *Id.* at 25-26.

<sup>228</sup> *See id.* at 25 (“That interconnection may be something of substantial importance for anyone proposing to change or repeal any one or more items in the array [of legal concepts] . . .”).

<sup>229</sup> *See generally* 1 FARNSWORTH, *supra* note 3, §§ 3.6-3.7 (discussing the general acceptance of OMA and methods of determining whether a party intended to be legally bound by the contract).

<sup>230</sup> *See id.* § 3.7, at 213 (“The fact that one gives the matter no thought does not impair the effectiveness of one’s assent, for there is no requirement that one intend or even understand the legal consequences of one’s actions.”).

<sup>231</sup> *See id.* (“This rule . . . has the salutary effects of generally relieving each party to a dispute of the burden of showing the other’s state of mind . . . and of helping to uphold routine agreements.”).

requirement for assent—one that might threaten to unwind the OMA, which is fundamental to the common law on contracts.

Unconscionability may also come into tension with the parol evidence rule. This rule holds that, if a contract is considered “integrated” or “partially integrated,” evidence of prior or contemporaneous negotiations or agreements is not admissible to contradict a term of the writing.<sup>232</sup> While many courts have considered contracts of adhesion to be completely integrated because they appear, by their thoroughness, to be intended as a final expression of the terms of the agreement,<sup>233</sup> the Second Restatement allows the admission of evidence of prior negotiations to show that the writing is not intended to be the final expression of the terms, and is therefore not integrated.<sup>234</sup>

On its face, unconscionability may appear to contradict the PER because it allows a court to find that the contract’s terms as they appear in writing are not the full expression of the contract, even if the contract otherwise appears to be an integrated agreement. Using unconscionability, a court can find that, where a contract includes explicit written terms that a reasonable consumer would not expect, those terms are void. This is antithetical to the PER, which prioritizes the written contract over evidence about what the parties believed they were agreeing to, thereby making contract enforcement more efficient.

However, unconscionability as described here can function with the PER. Because the PER, under the Second Restatement view, allows evidence of negotiations to show that the writing is not integrated, unconscionability is merely a particular application of the PER; it allows that weak OMA correspondingly weakens the PER. A showing of weak OMA (i.e., procedural unconscionability) operates to show that the contract is unintegrated, and the PER correspondingly allows the consumer to introduce evidence of reasonable expectations or likely harm to third parties to show what the parties “actually” agreed to as part of their prior or contemporary “negotiations” (i.e., substantive unconscionability).

It may be strange to think that the negotiation over a contract of adhesion occurs through the parties’ reasonable expectations, not through the parties’ actual communications. In typical contracts of adhesion, there are no actual

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<sup>232</sup> U.C.C. § 2-202 (AM. LAW INST. & NAT’L CONFERENCE OF COMM’RS ON UNIF. STATE LAWS 2014).

<sup>233</sup> See 2 FARNSWORTH, *supra* note 3, § 7.3, at 227 (“[I]f a writing appears in view of its thoroughness and specificity to embody a final agreement on the terms that it contains, the agreement is conclusively to be taken as an integrated one with respect to those terms.” (footnote omitted)).

<sup>234</sup> See RESTATEMENT (SECOND) OF CONTRACTS § 209(3) (AM. LAW INST. 1981) (“Where the parties reduce an agreement to a writing which in view of its completeness and specificity reasonably appears to be a complete agreement, it is taken to be an integrated agreement unless it is established by *other evidence* that the writing did not constitute a final expression.” (emphasis added)).

communications at all beyond the contract itself. It therefore may seem nonsensical to introduce evidence of a party's reasonable expectations as evidence of a kind of negotiation for the purpose of demonstrating that the contract was not integrated.

But unconscionability is actually quite consistent with the idea of considering negotiations between the parties to determine the terms in an unintegrated contract. By looking at the consumer's reasonable expectations, substantive unconscionability considers whether *both* parties had reason to understand the contract a certain way. In adhesive contracts, both parties would have reason to understand that the agreement was not the written terms, but rather the terms the consumer might expect the contract to contain. Thus, evidence of the parties' reasonable expectations actually addresses just what evidence of contemporary negotiations would get at—what reasonable parties would think they were agreeing to in contract in those circumstances.

So, while unconscionability interacts with both OMA and the PER, it does not undermine those concepts. By defining the jural meaning of unconscionability, one can see how it fits with the rest of the concepts in the common law of contracts as well as the law's systematicity as a unified web.

#### *E. Reasonable Expectations and Substantive Fairness*

Incorporating parties' "reasonable expectations" into the substantive law of unconscionability may seem an empty appeal to past practice. But it does more—it incorporates an element of substantive fairness by appealing directly to extralegal norms and practices.

Any doctrine that relies on a party's expectations creates a paradoxical feedback loop because a party will expect what a court has done in the past. Thus, it may seem that relying on a party's expectations merely cements the law in place; when courts rely on "reasonable expectations" to shape the law, they create a kind of self-contained system. What they have said in the past becomes a justification, in and of itself, to continue to do it in the future, on the basis of parties' expectations. If this were the law, it might further predictability, but it would not necessarily further justice; a court is not justified in treating a party unfairly simply because she expected it. More must be done to ground a court's decision. Expectations are only a piece of the justification—surely fairness must be a part of a court's decision too.

But when courts employ a justification based on "reasonable expectations of the parties," they are doing more than looking to what the law has said in the past. They are looking also to societal norms, culture, and practices. After all, the way people expect to be treated is not based just on what the law allows and what it punishes. It is based on norms and cues, cultural narratives,

and shared practice. The law draws on all these sources of information to determine what is owed to a party who happens to be before the court now but was, when conducting the activity at issue, acting within the ambit of all these other social, cultural, and shared expectations. Law governing the Fourth Amendment has considered “reasonable expectations” this way. As the Supreme Court recognized in that context,

[I]t would, of course, be merely tautological to fall back on the notion that those expectations of privacy which are legitimate depend primarily on cases deciding exclusionary-rule issues in criminal cases. Legitimation of expectations of privacy by law must have a source outside of the Fourth Amendment, either by reference to concepts of real or personal property law or to understandings that are recognized and permitted by society.<sup>235</sup>

Incorporating parties’ expectations in this way directly pulls cultural norms into the common law. Rather than create a circular and self-justifying system, using “reasonable expectations” allows courts to look to extralegal sources of norms to make decisions.

For this reason, incorporating parties’ reasonable expectations into the doctrine of unconscionability would be unlikely to result in vastly unfair contract law, though this is an empirical matter based on what consumers think they are agreeing to in form contracts. However, it would likely not give all the benefits back to consumers, either, because certainly there are some limitations—such as limitations on the forum so that it is convenient to the business, or moderate limitations on the time to file a claim—which a consumer may reasonably expect in a contract. Nevertheless, while it is difficult to say without polls and data,<sup>236</sup> consumers are not likely to expect to be required to pay the defendant’s litigation costs, to be required to file in a distant forum, or to have only a few weeks to bring a claim. In these areas, relying on the notion of reasonable expectations would likely help consumers.

## CONCLUSION

Unconscionability’s progress toward conceptual coherence would have many benefits: it would make courts’ judgments more predictable, make the law more stable, and be consistent with the systematicity of the law. But, as

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<sup>235</sup> *Rakas v. Illinois*, 439 U.S. 128, 143-44 n.12 (1978).

<sup>236</sup> Some have started studying these questions. For example, professors at St. John’s University School of Law recently looked at consumers’ awareness and understanding of arbitration clauses in contracts of adhesion. See Jeff Sovern et al., “Whimsy Little Contracts” With Unexpected Consequences: An Empirical Analysis of Consumer Understanding of Arbitration Agreements (St. John’s Legal Studies, Research Paper No. 14-0009, Feb. 19 2015), <http://ssrn.com/abstract=2516432> [<http://perma.cc/3TBK-DGKN>]. They found that less than nine percent of consumers realized both that a contract presented to them contained an arbitration clause and that the clause would prevent consumers from proceeding in court. *Id.* at 105 fig.7.

Frederick Schauer articulated, the benefits of concepts are not without sacrifices. By unifying certain factual scenarios, concepts necessarily exclude others. This means unconscionability would not be a ready tool for some of the purposes for which it is used currently.<sup>237</sup> Still, the overall benefit of predictability is worth this cost, especially since courts use of public policy can pick up where unconscionability left off.

The Third Restatement of Contracts will specifically address contracts of adhesion (which it calls “consumer-to-business contracts”) and will likely need to grapple with the conceptual framework of unconscionability.<sup>238</sup> Interestingly, this is an example of the fracturing of the law that Morton Horwitz predicted: he described transsubstantive concepts—concepts that reached across fields of law that had previously been “conceived of as a series of special cases and particular rules”—as the beginning of the end for systematization of the common law.<sup>239</sup> He thought that by reaching across substantive domains, the common law sowed the seeds of its own destruction because it brought up contradictions in different substantive areas of law.<sup>240</sup> The Third Restatement may create a new subdivision in contract law between consumer-to-business and business-to-business contracts. It will use a substantive division to avoid losing the systematicity of law threatened by the potential for conflict between unconscionability and other legal concepts in contract law. By drawing a substantive line, it therefore may avoid the problem Horwitz identified when concepts and rules become too broad.

This Comment takes a different approach. Rather than drawing a substantive line between contracts of adhesion and all other contracts, this Comment puts forth a way to define unconscionability such that the concept is consistent with other common law concepts. In this way, it is consistent with the formalist transsubstantive agenda.

A coherent concept of unconscionability is developing. It rests on a normative meaning consistent with the law and economics scholarship, and employs a jural meaning that looks to reasonable consumers’ expectations and harm to third parties. It is a concept that does not twist data in conformity with its category, as Llewellyn feared,<sup>241</sup> but rather operates with an eye toward its practical effects.

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<sup>237</sup> See *supra* note 203 and accompanying text.

<sup>238</sup> See *supra* note 29 and accompanying text.

<sup>239</sup> HOROWITZ, *supra* note 19, at 14.

<sup>240</sup> *Id.* at 14-15.

<sup>241</sup> See Llewellyn, *supra* note 90, at 453 (arguing that categories and concepts tend “to suggest the presence of corresponding data when these data are not in fact present, and to twist any fresh observation of data into conformity with the terms of the categories”).